OFFICIAL CODE OF GEORGIA ANNOTATED

2015 Supplement

Including Acts of the 2015 Regular Session of the General Assembly

Prepared by

The Code Revision Commission

The Office of Legislative Counsel

and

The Editorial Staff of LexisNexis®

Published Under Authority of the State of Georgia

Volume 14A

2011 Edition

Title 16. Crimes and Offenses (Chapters 7—11)

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

Place in Pocket of Corresponding Volume of Main Set

LexisNexis®
Charlottesville, Virginia

ISBN 978-0-327-11074-3 (set)
ISBN 978-1-4224-9385-4

5018233

(Pub.41805)

THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

Contacting LexisNexis®:

Visit our Website at http://www.lexisnexis.com for an online bookstore, technical support, customer service, and other company information.

If you have questions or suggestions concerning the Official Code of Georgia Annotated, please write or call toll free at 1-800-833-9844, fax at 1-518-487-3584, or email us at Customer.Support@lexisnexis.com. Direct written inquiries to:

LexisNexis®
Attn: Official Code of Georgia Annotated
701 East Water Street
Charlottesville, Virginia 22902-5389

TITLE 16

CRIMES AND OFFENSES

VOLUME 14

Chap.

1. General Provisions, 16-1-1 through 16-1-12.
3. Defenses to Criminal Prosecutions, 16-3-1 through 16-3-40.
5. Crimes Against the Person, 16-5-1 through 16-5-110.
6. Sexual Offenses, 16-6-1 through 16-6-25.

VOLUME 14A

7. Damage to and Intrusion upon Property, 16-7-1 through 16-7-97.
8. Offenses Involving Theft, 16-8-1 through 16-8-106.
9. Forgery and Fraudulent Practices, 16-9-1 through 16-9-157.
10. Offenses Against Public Administration, 16-10-1 through 16-10-98.
11. Offenses Against Public Order and Safety, 16-11-1 through 16-11-203.

VOLUME 14B

12. Offenses Against Public Health and Morals, 16-12-1 through 16-12-191.
13. Controlled Substances, 16-13-1 through 16-13-114.
14. Racketeer Influenced and Corrupt Organizations, 16-14-1 through 16-14-15.
15. Street Gang Terrorism and Prevention, 16-15-1 through 16-15-11.
16. Civil forfeiture of Property Used in Burglary, Armed Robbery, or Home Invasion, 16-16-1 through 16-16-2.

Law reviews. — For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

CHAPTER 7

DAMAGE TO AND INTRUSION UPON PROPERTY

Article 1

Burglary

Sec.
16-7-1. Burglary.

Article 1A

Home Invasion

16-7-5. Home invasion in the first and second degree.

Article 4

Bombs, Explosives, and Chemical and Biological Weapons

Sec.
16-7-95. Civil forfeiture for violations of article; special provisions for destructive material.

ARTICLE 1

BURGLARY

16-7-1. Burglary.

(a) As used in this Code section, the term:

(1) "Dwelling" means any building, structure, or portion thereof which is designed or intended for occupancy for residential use.

(2) "Railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

(b) A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another. A person who commits the offense of burglary in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. Upon the second conviction for burglary in the first degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than two nor more than 20 years. Upon the third and all subsequent convictions for burglary in the first degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than five nor more than 25 years.

(c) A person commits the offense of burglary in the second degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant building, structure, vehicle, railroad car, watercraft, or aircraft. A person who commits the offense of burglary in the second degree shall

be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years. Upon the second and all subsequent convictions for burglary in the second degree, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than eight years.

(d) Upon a fourth and all subsequent convictions for a crime of burglary in any degree, adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld. (Laws 1833, Cobb's 1851 Digest, p. 790; Ga. L. 1858, p. 98, § 1; Code 1863, §§ 4283, 4285; Ga. L. 1865-66, p. 232, § 2; Ga. L. 1866, p. 151, § 1; Ga. L. 1868, p. 16, § 1; Code 1868, §§ 4320, 4322; Code 1873, §§ 4386, 4388; Ga. L. 1878-79, p. 65, §§ 1, 2; Code 1882, §§ 4386, 4388; Penal Code 1895, §§ 149, 150; Penal Code 1910, §§ 146, 147; Code 1933, §§ 26-2401, 26-2402; Code 1933, § 26-1601, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1977, p. 895, § 1; Ga. L. 1978, p. 236, § 1; Ga. L. 1980, p. 770, § 1; Ga. L. 2012, p. 899, § 3-1/HB 1176.)

The 2012 amendment, effective July 1, 2012, rewrote this Code section, which read: "(a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term 'railroad car' shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

"(b) Upon a second conviction for a crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than two nor more than 20 years. Upon a third conviction for the crime of burglary occurring after the first conviction, a person shall be punished by imprisonment for not less than five nor more than 20 years. Adjudication of guilt or imposition of sentence shall not be suspended, probated, deferred, or withheld for any offense punishable under this subsection." See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "more than" was substituted for "more that" in the next-to-last sentence of subsection (b).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Elements of Burglary

2. Unauthorized Entry
3. Intent
Indictments
Jury Instructions
Inferences and Sufficiency and Admissibility of Evidence
Sentencing

General Consideration

Identification of defendant. — With regard to the defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Evidence sufficient for delinquency adjudication.

Evidence was sufficient to adjudicate a child delinquent for the adult crime of burglary under O.C.G.A. § 16-7-1 based on a neighbor's testimony that the neighbor saw the child tampering with and opening the victim's back door and the child's admission that the child "cracked" the door. That day, it was discovered that money and video games were taken from the victim. In the Interest of R. H., 313 Ga. App. 416, 721 S.E.2d 628 (2011).

Sufficient evidence to prove identity and intent. — Evidence in support of the burglary charge was sufficient to prove identity and intent as the victim identified the defendants as the individuals who had been in the victim's house when the officers drove to the victim's house with the defendants. In addition, the jury was authorized to find that the defendants intended to commit a theft when the defendants entered the house without permission, looked behind and inside the victim's furniture, and left once the victim called police. Gorman v. State, 318 Ga. App. 535, 734 S.E.2d 263 (2012).

Probable cause for arrest. — Arrestee's false arrest claim failed because probable cause existed to arrest the arrestee for burglary; an eyewitness observed the arrestee and another person entering a vacant home, officers found that the home's back door appeared to have been damaged, and the arrestee and the other person admitted that they did not have permission to enter. Gray v. Ector, No. 12-11323, 2013 U.S. App. LEXIS 19261 (11th Cir. Sept. 18, 2013) (Unpublished).

Cited in Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012); Coleman v. State, 318 Ga. App. 478, 735 S.E.2d 788 (2012); Ware v. State, 321 Ga. App. 640, 742 S.E.2d 156 (2013); Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013); Williams v. State, 326 Ga. App. 784, 757 S.E.2d 448 (2014); Easter v. State, 327 Ga. App. 754, 761 S.E.2d 149 (2014); Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015).

Elements of Burglary

2. Unauthorized Entry

Affirmative defenses.

Because a defendant's evidence that the defendant acted under a misapprehension of fact in entering a house would have authorized the jury to acquit the defendant of burglary under O.C.G.A. § 16-7-1(a), and because the charge that was given did not properly inform the jury about the true nature of the defendant's affirmative defense, the defendant was entitled to a charge on mistake of fact under O.C.G.A. § 16-3-5. Price v. State, 289 Ga. 459, 712 S.E.2d 828 (2011).

Entry gained by fraud, deceit, or false pretense. — Appellate court erred by reversing appellee's conviction for burglary because a person enters a home without authority when that person enters without the consent of the owner and when that consent was obtained by fraud, deceit, or false pretense, thus, by fraudulently posing as a potential house purchaser and providing false identification

and information, appellee violated O.C.G.A. § 16-7-1. State v. Newton, 294 Ga. 767, 755 S.E.2d 786 (2014).

Entry gained by fraud, deceit, or false pretense. — Intruder who breaches the barrier with a lie or deception, by pretending to deliver a package or to read a meter, is no less dangerous than their more stealthy cohorts, and nothing in the burglary statute, O.C.G.A. § 16-7-1, suggests an intent to exempt them from liability. State v. Newton, 294 Ga. 767, 755 S.E.2d 786 (2014).

Entry into store. — Evidence was sufficient to convict a defendant of burglarizing a tool supply store, because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or if error was not harmful, because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878 (2011).

3. Intent

Effect of defendant's intoxication. — Evidence was sufficient to support the defendant's burglary conviction since the jury decided that evidence of the defendant's intoxication did not disprove intent. In addition to testimony about the television wires having been disconnected from various devices in the victim's house, one witness testified that the television was sitting upright on the floor, not face-down, despite the defendant's testimony that the defendant had knocked the television off the stand. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Sufficient evidence of intent.

Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite the officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Indictments

Failure to file timely special demurrer. — Defendant could admit every allegation of the indictment and still lack the requisite intent for an attempt at burglary. Consequently, the indictment would not have withstood a timely general demurrer, and trial counsel's performance was deficient in counsel's failure to timely challenge the validity of the attempted burglary count. Coleman v. State, 732 S.E.2d 466, No. A12A1087, 2012 Ga. App. LEXIS 777 (2012).

Sufficient. — Burglary count of the indictment was sufficient to withstand a general demurrer because although the offense was mislabeled as "aggravated battery" in the body of the count, the averment portion of the count followed the language of the burglary statute and fully apprised defendant of the offense charged. The subject heading of the count clearly referred to the offense as burglary and the heading was followed by a citation to the burglary statute itself. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

No fatal variance between indictment and proof.

Any variance between the indictment and the evidence at trial pertaining to the ownership of the building burglarized was not fatal, because ownership was not an element of burglary. Smarr v. State, 317 Ga. App. 584, 732 S.E.2d 110 (2012).

Defendant waived the defendant's argument that there was a fatal variance between the indictment for burglary and the proof by not presenting the indictment to the trial court; moreover, given evidence from the victim that the victim did not owe the defendant any money and that the defendant broke into the victim's apartment and then left with the victim's television and a cell phone, there was no variance. Thompson v. State, 324 Ga. App. 20, 749 S.E.2d 27 (2013).

Jury Instructions

Charge on criminal trespass as lesser included offense.

Because there was no written request,

Jury Instructions (Cont'd)

the trial court did not err by failing to instruct the jury on criminal trespass as a lesser included offense of burglary Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Defendant's trial counsel was not ineffective for failing to request a jury charge on criminal trespass as a lesser included offense of burglary since such a charge would not have been warranted by the evidence, which showed that the defendant harbored either the unlawful purpose of committing theft or the lawful purpose of going back to sleep in a friend's house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Defendant was not entitled to an instruction on criminal trespass as a lesser included offense of burglary because, if the jury believed the state's evidence, the defendant was guilty of burglary and if the jury accepted the defendant's defense to the crime, the defendant was guilty of no offense. Stillwell v. State, 329 Ga. App. 108, 764 S.E.2d 419 (2014).

Refusal to charge mistake of fact. — Trial court did not err in failing to charge the jury on the defense of mistake of fact under O.C.G.A. § 16-3-5 as to the burglary counts of the indictment because the fact that the defendant could have thought that someone lived in the home did not constitute the type of mistake of fact that would serve as a defense to the defendant's unauthorized entry into the home since the evidence was uncontroverted that the defendant was not invited into the home. Boatright v. State, 289 Ga. 597, 713 S.E.2d 829 (2011).

Inferences and Sufficiency and Admissibility of Evidence

Inference or presumption of fact sufficient to convict.

Jury was authorized to find the defendant guilty of burglary beyond a reasonable doubt because the evidence showed that the defendant was seen loading the victim's furniture, television and other items onto a truck, the victim did not know the defendant and did not give the defendant permission to enter the apartment or take any belongings, and the defendant's intent could be inferred from falsely telling a witness that permission was given to take the items. Pullins v. State, 323 Ga. App. 664, 747 S.E.2d 856 (2013).

Sufficient circumstantial evidence supported burglary of school conviction. — State provided circumstantial evidence to support the defendant's burglary conviction including evidence to show that the building had an alarm that was set for the night, the defendant entered the building by breaking a window and setting off the alarm, the defendant was not an employee or parent of a student at the school, and the defendant fled after setting off the alarm. Harris v. State, 322 Ga. App. 122, 744 S.E.2d 111 (2013).

Sufficient circumstantial evidence of intent.

Defendant's conviction of criminal attempt to commit burglary was affirmed because while the defense presented a different theory of events and claimed that defendant did not act with the intent to commit a theft, it was the jury's province to assess witness credibility, resolve the conflicts in the evidence, and determine whether there was a reasonable hypothesis of innocence favorable to defendant. Anthony v. State, 317 Ga. App. 807, 732 S.E.2d 845 (2012).

With regard to the defendant's conviction for attempted burglary, sufficient evidence supported the conviction because the jury evaluated the nature of the circumstances of the morning's events, as well as the daughter's eyewitness testimony identifying the defendant and, although defendant explained that it was mistakenly the wrong house, the jury was authorized to come to a different and reasonable conclusion based on the state's case. White v. State, 323 Ga. App. 660, 744 S.E.2d 857 (2013).

Evidence was sufficient to prove intent for burglary as the jury could infer an intent to steal based on the evidence of an unlawful entry into a building housing an operating business, despite no evidence that valuable items were located in the building, and that defendant crawled out of the window during a time when the business was closed, and ran when confronted by the security guard. Taylor v.

State, 325 Ga. App. 736, 754 S.E.2d 781 (2014).

Identification of defendant. — Sufficient evidence supported the defendant's convictions for two counts of armed robbery with respect to two victims at the first residence, attempt to commit armed robbery with respect to one of the victims at the first residence, and two counts of burglary with respect to the two residences because the accomplice testimony was sufficiently corroborated by one of the witnesses, who identified the defendant. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Fingerprint evidence.

Juvenile's fingerprint, which was found on a bottle of tonic water at the crime scene, was sufficient evidence to support the adjudication of the juvenile as delinquent for committing burglary in violation of O.C.G.A. § 16-7-1, and the juvenile's alternative hypothesis that the juvenile earlier touched the bottle while the bottle was in the stream of commerce before the victim purchased the bottle was not plausible. In the Interest of H. A., 311 Ga. App. 660, 716 S.E.2d 768 (2011).

Evidence sufficient to establish unlawful entry.

Sufficient evidence supported the defendant's conviction for burglary based on the evidence that showed that the defendant and the co-defendant approached the victim's house armed and with the intent to rob, that the co-defendant knocked and gave a false name to entice the occupants to open the door, that the defendants entered the house without being invited in, that the victim immediately attempted to make the strangers leave the house, and that the intruders drew their guns as the intruders entered, all of which established that the defendant entered the house without authority. Thomas v. State, 292 Ga. 429, 738 S.E.2d 571 (2013).

Sufficient evidence supported defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Sufficient evidence supported the defendant's conviction for burglary based on witnesses observing five or six radiators in the back seat of the defendant's car immediately after exiting the premises, a dummy lock was found on the back gate, tire tracks led up to the rear of the buildings where a roll-up door showed signs of forced entry, two witnesses watched the defendant drive away, and incriminating evidenced existed, including admissions. Harris v. State, 328 Ga. App. 852, 763 S.E.2d 133 (2014).

Evidence sufficient to sustain conviction of attempted burglary.

Evidence was sufficient to sustain the defendant's attempted burglary conviction since the victim testified that, after the victim woke and saw the defendant outside, the victim found the screen to an open window on the hood of the victim's car and found a piece of carpet the victim had left in the window sill for the victim's cat to sit on in the yard. The jury thus could have found that the defendant removed the screen in an attempt to gain entrance into the house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

While the victim initially identified someone else as the assailant, evidence that that defendant's DNA matched the seminal fluid found on the victim's clothing, the defendant was seen near the house shortly after the rape, and the defendant's shirt was found in the residence supported the defendant's convictions for rape, child molestation, false imprisonment, and burglary. Couch v. State, 326 Ga. App. 207, 756 S.E.2d 291 (2014).

Identification of defendant. — Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt.

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)

Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Sufficient evidence existed to support the defendant's conviction for burglary, aggravated assault, and two counts of cruelty to children in the second degree based on the evidence adduced at trial that the defendant broke into the adult victim's apartment through a rear window and attacked the victim, stabbed the adult victim in the neck, dragged the victim down the hall, and stabbed the victim's hand and, although the defendant put a cloth over the victim's face at some point, the adult victim saw that the person stabbing the victim in the neck was the defendant, the victim's ex-boyfriend, and the victim positively and consistently identified the defendant as the perpetrator. White v. State, 319 Ga. App. 530, 737 S.E.2d 324 (2013).

Circumstantial evidence identifying defendant. — There was sufficient evidence to support the defendant's conviction for burglary, despite a witness being impeached, because while there was conflicting testimony about what the witness told police and whether the defendant had sold the stolen phone to someone else, the circumstantial evidence identifying the defendant as the perpetrator was sufficient. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Sufficient evidence for conviction.

Evidence that a defendant was seen riding a bicycle after midnight while carrying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later determined to have been broken into and a tool belt and saw taken, was sufficient to convict the defendant of burglary under O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801). Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to support the defendant's conviction for burglary, under O.C.G.A. § 16-7-1(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told the relatives what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585 (2011).

Evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2), because although the defendant argued that there

was insufficient credible and admissible evidence to show that the defendant was the victim's attacker, determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury; defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Evidence was sufficient for any rational trier of fact to find the defendant juvenile delinquent due to the defendant's involvement in the burglary of a pharmacy because an accomplice's testimony that the defendant participated in the burglary was corroborated; the extraneous evidence, even if slight and entirely circumstantial, connected the defendant to the burglary. In the Interest of R.W., 315 Ga. App. 227, 726 S.E.2d 708 (2012).

Evidence was sufficient to support the defendant's convictions of aggravated assault, aggravated battery, and burglary because the evidence showed that: (1) the defendant broke into his ex-girlfriend's home; (2) the defendant stabbed the ex-girlfriend's current boyfriend in the spine with a knife, paralyzing him; (3) the defendant cut his ex-girlfriend with a knife on the back of her head, on the side of her face, on her shoulder and back, and stabbed her in the stomach; and (4) the ex-girlfriend continued to bear scars from the knife attack. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Evidence supported the defendant's convictions for felony murder, aggravated battery, kidnapping with bodily injury, aggravated assault, and burglary, when the state presented independent corroboration in support of an accomplice's testimony connecting the defendant to the crimes; the defendant's statements to police, the defendant's actions before and after the crimes, and the defendant's girlfriend's testimony stating that the defendant asked the girlfriend to lie about the defendant's whereabouts corroborated the defendant's guilt. Brown v. State, 291 Ga. 750, 733 S.E.2d 300 (2012).

Evidence was sufficient to support the second defendant's conviction for burglary as it was reasonable for the jury to have concluded that the second defendant acted as the getaway driver, waited for the first defendant while the first defendant was in the alley, covered for the first defendant when being questioned by the witness, and drove the first defendant from the scene when the first defendant ran away from the witness after being seen near the broken window. Nangreave v. State, 318 Ga. App. 437, 734 S.E.2d 203 (2012).

Evidence was sufficient to support the first defendant's conviction for burglary as the first defendant was found in close proximity to the window, appeared to be coming out of the window, ran from the scene, and was apprehended with a bag of merchandise confirmed to be from the store. Nangreave v. State, 318 Ga. App. 437, 734 S.E.2d 203 (2012).

Evidence was sufficient to support the defendant's conviction for burglary, in violation of O.C.G.A. § 16-7-1, based on the evidence showing that the defendant was hiding in the bushes in a field near the victim's chicken houses; that the defendant resided with the accomplice; that the defendant made a sale of copper wire to a recycling business the day after the burglary; and that buckets of coil wiring were present at the defendant's home after the burglary, which additional evidence more than satisfied the slight evidence requirement necessary to corroborate the testimony of the accomplice. Garrett v. State, 317 Ga. App. 520, 732 S.E.2d 93 (2012), cert. denied, No. S13C0065, 2013 Ga. LEXIS 81 (Ga. 2013).

Defendant's conviction for burglary was affirmed because the evidence, taken together, authorized the jury to find that the defendant was in possession of the victims' stolen plastic container filled primarily with quarters. Defendant knew of the location of the residence and during the burglary a large, heavy container filled with coins, primarily quarters, was stolen. Badie v. State, 317 Ga. App. 712, 732 S.E.2d 553 (2012).

There was sufficient evidence to support the defendant's conviction for two counts of burglary based on eyewitness testimony and a videotape showing the defen-

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)

dant with a baby stroller filled with contents taken from a store. Fitzpatrick v. State, 317 Ga. App. 873, 733 S.E.2d 46 (2012).

There was sufficient evidence to support the defendant's conviction for burglary based on the evidence adduced at trial that showed that the defendant intended to commit a theft based on the hot water heater and pipes being damaged less than an hour before the landlord saw the defendant exit the rental home through a back door while carrying an object with a red handle, there were no personal possessions of the former tenants located inside the home, the defendant and the defendant's friend fled when the landlord called 9-1-1, a red-handled bolt cutter was found underneath bushes near the door where the defendant exited, and the friend told the police that the friend and the defendant had gone to the home looking for copper wire and that the defendant had cut wire in the home. Floyd v. State, 319 Ga. App. 564, 737 S.E.2d 341 (2013).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Sufficient evidence existed to support the defendant's convictions for aiding and abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the co-defendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the co-defendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Evidence, taken together, authorized the jury to find that the defendant was guilty of burglary and contributed to the delinquency of a minor as the victim's neighbor identified the defendant as the person the neighbor saw standing on an air conditioner unit while beating on the victim's kitchen window, the point of entry for the burglary was that window and, just minutes after the neighbor saw the defendant at the window, the victim observed the defendant and a child walking away from the victim's residence carrying an item that was taken during the burglary. Williams v. State, 320 Ga. App. 831, 740 S.E.2d 766 (2013).

Evidence that two days after the burglary, the defendant was found in a motel room the defendant shared with a woman who was attempting to sell goods stolen from the burglarized residence; that the woman obtained the goods from the defendant; that stolen goods were found in the motel room; and that after the burglary was reported, the defendant went to the road of the burglarized residence to retrieve some items the defendant claimed the defendant dropped was sufficient to support the defendant's burglary conviction. Riles v. State, 321 Ga. App. 894, 743 S.E.2d 552 (2013).

Evidence that the defendant was found with a chainsaw and towel stolen from the subject residence the same day they were discovered missing, within a mile of the residence, and that the defendant had tried to pawn the chainsaw that same morning was sufficient to allow the jury to convict the defendant of burglary. Gaither v. State, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Evidence that the defendant was found in the laundry room of the home that was

the subject of the home burglary; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of the masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence that an officer responding to the burglary observed the defendant on the store's loading dock with unopen beer, the defendant ran upon seeing the officer, and testimony from two accomplices that the defendant was inside the store and had taken the beer was sufficient to support the defendant's burglary conviction. Russell v. State, 322 Ga. App. 553, 745 S.E.2d 774 (2013).

Evidence was sufficient to convict the defendant of armed robbery and burglary because three black males robbed the store, one of whom pointed a gun at the store manager; after the defendant was apprehended, the defendant made incriminating statements that the defendant took the stuff to pay bills and that the defendant did not know where the other two individuals were; and the bags found in the defendant's vicinity consisted of six cooler totes containing approximately $700 in merchandise from the store and a plastic bag containing money and the deposit slip from the store's safe. Brooks v. State, 324 Ga. App. 352, 750 S.E.2d 423 (2013).

Evidence that defendant had driven defendant's son to a home that was burglarized, was waiting by the side of the road for defendant's son to return, and received numerous calls from defendant's son while an officer stopped to talk to defendant, was sufficient to convict defendant for being a party to the crime of burglary under O.C.G.A. §§ 16-7-1(b) and 16-2-20. Wise v. State, 325 Ga. App. 377, 752 S.E.2d 628 (2013).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Because the temporary protective order specifically deprived the defendant of authority to enter the victim's home, and because the evidence supported a conclusion that the defendant entered that home without authority and with the intent to commit the crime of aggravated stalking, the evidence was sufficient to sustain the burglary conviction. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

Circumstantial evidence that a cigarette butt with the defendant's DNA on the butt was found in a burglary victim's home, that the defendant was seen standing in a neighbor's yard, that the defendant was wet and muddy, and that some of the stolen items were also wet and near a creek near the victim's home was sufficient to support the defendant's burglary conviction. Stokes v. State, 327 Ga. App. 511, 759 S.E.2d 585 (2014).

Evidence the defendant and the codefendant were found in a motel room with gloves, a bandana, broken glass pieces, and keys to the codefendant's vehicle, which contained 61 purses belonging to a store that had just been robbed, and that rocks like those used to break the glass were missing from landscaping next to the motel supported the defendant's conviction for burglary. Mackey v. State, 326 Ga. App. 298, 756 S.E.2d 552 (2014).

Evidence showing that shortly after the burglary the defendant pawned some of the items stolen, which the defendant claimed, but failed to prove, were obtained from a Mexican male, was sufficient to support the defendant's burglary conviction. Ricks v. State, 327 Ga. App. 291, 758 S.E.2d 624 (2014).

Evidence that the defendant confessed to police that the defendant had broken into the first victim's apartment to steal, broke the sliding glass door to gain entry, did not know the victim, and fled from police when the police arrived on the scene

Inferences and Sufficiency and Admissibility of Evidence (Cont'd)

was sufficient to support the defendant's burglary conviction. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

Evidence was sufficient to convict the defendant of burglary as a party because, pursuant to a plan the defendant designed, the defendant gained entry into the residence, then assisted the accomplice's unauthorized entry by returning to the door, peering outside where the accomplice was staged with a gun and mask, then leaving that door ajar for the accomplice's unauthorized entry; and, seconds later, the accomplice abruptly entered through that door, taking money and property from the other individuals present by use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Evidence that the defendant's DNA was found on a soda can left inside the victim's house after the burglary, the victim's stolen property was found in a house where the defendant was residing, and the defendant fled when officers tried to arrest the defendant was sufficient to support the defendant's convictions for burglary and theft by taking. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Sufficient evidence supported the defendant's conviction for burglary based on the victim's eyewitness encounter with the defendant inside the apartment, the defendant's admission that the defendant made an unauthorized entry into the apartment, the discovery of money exactly like that stolen from the victim's wallet inside the defendant's pocket, and the evidence of the defendant's two prior burglary convictions. Paul v. State, 331 Ga. App. 560, 769 S.E.2d 396 (2015).

Evidence sufficient to support convictions, etc.

Victim's testimony that the defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Sentencing

Construction with other law.

In a case in which defendant appealed a 41-month sentence for violating 18 U.S.C. §§ 922(a) and (g), a district court did not err in calculating the defendant's U.S. Sentencing Guidelines sentence. Defendant's 2011 burglary conviction under O.C.G.A. § 16-7-1(a) (current version at O.C.G.A. § 16-7-1(b)) was for burglary of a dwelling within the meaning of U.S. Sentencing § 4B1.2(a), and the district court did not err in concluding that the defendant had a prior conviction for a crime of violence. United States v. Harris, No. 13-13674, 2014 U.S. App. LEXIS 11872 (11th Cir. June 24, 2014) (Unpublished).

Multiple convictions.

Trial court did not err in sentencing the defendant as a recidivist because the records of an Alabama conviction showed that the defendant pled guilty to the offense of burglary in the third degree and received a sentence of four years imprisonment; the elements of the crime as charged in the Alabama indictment were similar to the elements required to commit the crime under O.C.G.A. § 16-7-1. Wells v. State, 313 Ga. App. 528, 722 S.E.2d 133 (2012).

Trial court did not err by correcting the court's written sentence to conform with the court's oral pronouncement because the trial court was authorized to correct the clerical error appearing in the court's written sentence as compared to the court's original oral pronouncement; the trial court, after reviewing the original transcript, determined that the court's original pronouncement and intent was for the aggravated battery and burglary counts to be served consecutive to each other as well as to the other aggravated battery count. Griggs v. State, 314 Ga. App. 158, 723 S.E.2d 480 (2012).

One of two burglary convictions was vacated because both burglary counts charged the defendant with entering the same building, a restaurant, on the same date with the intent to commit the same crime of theft and the evidence showed that the acts were committed at the same location, were inspired by the same criminal intent, and were part of a continuous

act spanning a matter of minutes. Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Sentencing of merger.

Defendant's burglary convictions should have been merged because both counts charged the defendant with entering the same building without authority on the same date to commit a felony. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

Immigration consequences to guilty plea. — Attorney's assistance was deficient when the attorney incorrectly advised the defendant that the defendant "may" face deportation as a result of the defendant's plea of guilty to burglary under O.C.G.A. § 16-7-1 because a burglary conviction was an aggravated felony, 8 U.S.C. § 1101(a)(43)(G), and would almost certainly lead to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii). Encarnacion v. State, 295 Ga. 660, 763 S.E.2d 463 (2014).

ARTICLE 1A

HOME INVASION

Effective date. — This article became effective July 1, 2014.

16-7-5. Home invasion in the first and second degree.

(a) As used in this Code section, the term "dwelling" shall have the same meaning as provided in Code Section 16-7-1.

(b) A person commits the offense of home invasion in the first degree when, without authority and with intent to commit a forcible felony therein and while in possession of a deadly weapon or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury, he or she enters the dwelling house of another while such dwelling house is occupied by any person with authority to be present therein.

(c) A person commits the offense of home invasion in the second degree when, without authority and with intent to commit a forcible misdemeanor therein and while in possession of a deadly weapon or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury, he or she enters the dwelling house of another while such dwelling house is occupied by any person with authority to be present therein.

(d) A person convicted of the offense of home invasion in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for life or imprisonment for not less than ten nor more than 20 years and by a fine of not more than $100,000.00. A person convicted of the offense of home invasion in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years and by a fine of not more than $100,000.00.

(e) Adjudication of guilt or imposition of sentence for home invasion in any degree may be probated at the discretion of the judge; provided, however, that such sentence shall not be suspended, deferred, or withheld.

(f) A sentence imposed under this Code section may be imposed separately from and consecutive to a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-7-5, enacted by Ga. L. 2014, p. 426, § 3/HB 770.)

ARTICLE 2

CRIMINAL TRESPASS AND DAMAGE TO PROPERTY

PART 1

GENERAL PROVISIONS

16-7-20. Possession of tools for the commission of crime.

JUDICIAL DECISIONS

Ken of average juror. — In the vast majority of cases construing O.C.G.A. § 16-7-20, whether a tool is commonly used in the commission of a crime is within the ken of the average juror and, in such cases, expert testimony is not required; jurors are entitled to use the jurors' knowledge and experience to decide both elements set out in the Code section, common use and intent. Kenemer v. State, 329 Ga. App. 330, 765 S.E.2d 21 (2014).

Cell phones as instrumentalities to commit crime. — Defendant's conviction for possession of cell phones as instrumentalities to commit a crime was supported by sufficient evidence based on finding the defendant with two cell phones, an officer testifying that based upon experience and training the possession of multiple cell phones was consistent with someone involved in drug distribution and, at the time of the defendant's arrest, the defendant also possessed 27 rocks of crack cocaine, over $272 in U.S. currency, and a digital scale. Bryant v. State, 320 Ga. App. 838, 740 S.E.2d 772 (2013).

Evidence was sufficient to support conviction

There was sufficient evidence to support the defendant's conviction for possessing tools for the commission of a crime based on eyewitness testimony and a videotape showing the defendant with a baby stroller filled with contents taken from a store. Fitzpatrick v. State, 317 Ga. App. 873, 733 S.E.2d 46 (2012).

Cited in Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

16-7-21. Criminal trespass.

JUDICIAL DECISIONS

Analysis

General Consideration
Elements of Crime
Authority with Regard to Property
Evidence and Corroboration
Included Crimes
Jury Charges
Application

General Consideration

Accusation not required to specify instrumentality used. — Accusation for battery, family violence, and criminal trespass that alleged that the defendant injured the victim by striking the victim, causing a visibly bloody lip, and that the defendant knocked a hole in the victim's closet door, was sufficient under O.C.G.A. § 17-7-71(c). There was no requirement that the accusation state the instrumentality used by the defendant because the instrumentality was not an element of any of the charged crimes. State v. Leatherwood, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Applicability to civil cases.

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Elements of Crime

Notice not to enter to be given by owner or rightful occupant.

Defendant's conviction for criminal trespass was reversed even though the evidence was that, pursuant to a divorce decree, defendant was prohibited from being on the property of the ex-spouse's work place until further order of the court because there was no evidence that the ex-spouse was the rightful occupant of the premises or that the rightful owner gave defendant prior notice. Sheehan v. State, 314 Ga. App. 325, 723 S.E.2d 724 (2012).

Authority with Regard to Property

Possession of weapon on premises. — Private property owners could forbid the possession of a weapon on their premises, as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1 to 51-3-2, and 51-9-1, provided the canvas on which the Second Amendment was drafted, illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Evidence and Corroboration

Evidence sufficient for conviction.

Because there was evidence to support each fact necessary to make out the state's case, the jury was authorized to find that the defendant was guilty beyond a reasonable doubt of family violence battery, O.C.G.A. § 16-5-23.1, criminal trespass, O.C.G.A. § 16-7-21, and abuse of an elder person, O.C.G.A. § 30-5-8; the victim's recollection of what occurred on the night at issue was contradicted by the victim's contemporaneous statements to neighbors and the police, as well as the victim's statements to the daughter the next morning that the defendant had grabbed the victim by the arm and twisted the arm, thereby causing the wound and other bruises. Laster v. State, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Evidence and Corroboration (Cont'd)

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Evidence was sufficient to support defendant's criminal trespass conviction when the victim testified that the defendant snapped the victim's cell phone in half, rendering the cell phone inoperable, and that the cell phone was worth less than $500. Although there was no evidence of the specific monetary amount of damage done to the cell phone, the jurors were authorized to draw from the jurors' own experience in forming an estimate of the damage to the cell phone, which was an everyday object. Feagin v. State, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

Included Crimes

Rule of lenity did not apply. — Trial court did not err in not applying the rule of lenity with regard to the defendant's conviction for criminal attempt to commit burglary because the crimes of criminal trespass and criminal attempt to commit a burglary did not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Jury Charges

Failure to charge criminal trespass. Defendant was not entitled to an instruction on criminal trespass as a lesser included offense of burglary because, if the jury believed the state's evidence, the defendant was guilty of burglary and if the jury accepted the defendant's defense to the crime, the defendant was guilty of no offense. Stillwell v. State, 329 Ga. App. 108, 764 S.E.2d 419 (2014).

Charge inconsistent with evidence. Defendant's trial counsel was not ineffective for failing to request a jury charge on criminal trespass as a lesser included offense of burglary since such a charge would not have been warranted by the evidence, which showed that the defendant harbored either the unlawful purpose of committing theft or the lawful purpose of going back to sleep in a friend's house. Dillard v. State, 323 Ga. App. 333, 744 S.E.2d 863 (2013).

Charge supported by evidence. — In an action for criminal trespass, the trial court did not err by charging the jury on the custody of children who have not been legitimated because whether the defendant was authorized to enter the premises based on a legal right the defendant had to the proprietor's child was raised by the evidence, the charge given was a correct principle of law, and the charge was not likely to confuse the jury regarding the defendant's guilt or innocence of criminal trespass. Hudson v. State, 321 Ga. App. 702, 742 S.E.2d 516 (2013).

Application

Warrantless arrest of hotel guest proper. — Exigent circumstances authorized an officer's warrantless arrest of a hotel guest for criminal trespass because the offense was committed in the officer's presence when the guest refused the officer's request to leave the hotel. Thus, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Probable cause to arrest hotel guest. — As a police officer, acting with the authority and direction of a hotel, notified a guest to depart the hotel due to the guest's unruly behavior, but the guest did not depart, the officer had probable cause to arrest the guest for criminal trespass. Therefore, the guest's false imprisonment claim against the hotel was properly dismissed on summary judgment. Lewis v. Ritz Carlton Hotel Co., LLC, 310 Ga. App. 58, 712 S.E.2d 91 (2011).

Probable cause for arrest following accident. — Even assuming that the plaintiff was arrested rather than detained when the plaintiff was placed in the backseat of a patrol car at the scene of an accident, the officer was entitled to qualified immunity as the plaintiff failed to set forth a claim that the plaintiff's clearly established Fourth Amendment rights were violated. Even if the officer was mistaken, the officer was entitled to rely on a victim's allegations at the scene of the accident and, thus, the officer had reason to believe that the plaintiff damaged the property of another person without consent in violation of Georgia law; further, because the warrantless arrest was supported by at least arguable probable cause, the officer was entitled to search the plaintiff incident to that arrest. Moreno v. Turner, No. 14-11015, 2014 U.S. App. LEXIS 13923 (11th Cir. July 22, 2014) (Unpublished).

Value of property. — Conviction for damage to property in the second degree was vacated and one for criminal trespass to property entered as the opinion of the victim's network manager that the victim incurred $1,929 in labor expenses for repairs to cut telephone wire was not competent evidence as it was not based on personal knowledge and the only competent evidence showed $384 was spent to replace materials. Clement v. State, 324 Ga. App. 39, 749 S.E.2d 41 (2013).

Evidence sufficient to support delinquency.

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C. R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

Evidence sufficient for conviction of trespassing on school grounds. — As it was undisputed that the defendant was on school property despite previously having been banned, and there was no testimony that the defendant received written authorization to be present on the property, the evidence was sufficient to support a criminal trespass conviction. Isenhower v. State, 324 Ga. App. 380, 750 S.E.2d 703 (2013).

Rule of lenity inapplicable. — With regard to defendant's conviction for criminal attempt to commit burglary in the first degree, the trial court did not err in not applying the rule of lenity because the crimes of criminal trespass and criminal attempt to commit a burglary do not address the same criminal conduct and there was no ambiguity created by different punishments being set forth for the same crime, thus, the rule of lenity did not apply. Snow v. State, 318 Ga. App. 131, 733 S.E.2d 428 (2012).

Failure to obey request to leave jail premises insufficient for arrest. — No reasonable officer in the same circumstances and possessing the deputy's knowledge could have believed that probable cause existed to arrest the plaintiff for criminal trespass, when and where the plaintiff was arrested. The scope of the deputy's warning to "leave" or "get the hell out of here" issued on the sidewalk immediately outside the jail building did not extend definitely and reasonably to the entirety of the jail property over 1000 feet away or to property beyond the sidewalk and beyond the bounds of the jail parking lot; the lack of the needed explicitness of the notice to depart was not debatable. Kopperud v. Mabry, No. 14-10232, 2014 U.S. App. LEXIS 14336 (11th Cir. July 28, 2014) (Unpublished).

Proof of damages for broken window. — Sufficient evidence supported the defendant's conviction for criminal trespass because the evidence showed that a window was broken in the victim's apartment and that the defendant had glass in the defendant's hair when loading the victim's furniture onto a truck; although there was no evidence of the specific monetary amount of damage done to the window, the jurors were authorized to draw from the jurors' own experience in forming an estimate of the damage to the window, which was an everyday object. Pullins v. State, 323 Ga. App. 664, 747 S.E.2d 856 (2013).

16-7-22. Criminal damage to property in the first degree.

JUDICIAL DECISIONS

Proper predicate for possession of a firearm during the commission of a felony. — Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

First and second degree criminal damage to property do not merge. — Trial court did not err in failing to merge the defendant's convictions for the criminal damage to property charges because criminal damage to property in the first degree required evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree required evidence that the damage to property exceeded $500, neither of which was required in the other. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

16-7-23. Criminal damage to property in the second degree.

JUDICIAL DECISIONS

Probable cause for arrest.

When an arrestee refused to allow a guest back into the arrestee's home and removed the guest's things, officers were not entitled to qualified immunity as to the arrestee's claims under the Fourth and Fourteenth Amendments, because the officers did not show that the officers had probable cause to arrest the arrestee for criminal damage to property under O.C.G.A. § 16-7-23 since the arrestee alleged that the arrestee did not damage any of the guest's property and that an officer knew that at least some of the property was not actually damaged. Gray v. City of Roswell, No. 12-10817, 2012 U.S. App. LEXIS 16852 (11th Cir. Aug. 13, 2012) (Unpublished).

Even assuming that the plaintiff was arrested rather than detained when the plaintiff was placed in the backseat of a patrol car at the scene of an accident, the officer was entitled to qualified immunity as the plaintiff failed to set forth a claim that the plaintiff's clearly established Fourth Amendment rights were violated. Even if the officer was mistaken, the officer was entitled to rely on a victim's allegations at the scene of the accident and, thus, the officer had reason to believe that the plaintiff damaged the property of another person without consent in violation of Georgia law; further, because the warrantless arrest was supported by at least arguable probable cause, the officer was entitled to search the plaintiff incident to that arrest. Moreno v. Turner, No. 14-11015, 2014 U.S. App. LEXIS 13923 (11th Cir. July 22, 2014) (Unpublished).

First and second degree criminal damage to property do not merge. — Trial court did not err in failing to merge the defendant's convictions for the criminal damage to property charges because criminal damage to property in the first degree required evidence that the defendant acted in a manner that endangered human life, whereas criminal damage to property in the second degree required evidence that the damage to property exceeded $500, neither of which was required in the other. Sullivan v. State, 331 Ga. App. 592, 771 S.E.2d 237 (2015).

Criminal trespass is lesser included offense.

While the evidence was insufficient under O.C.G.A. § 16-7-23(a)(1) to conclude that a juvenile damaged property at a mobile home park in excess of $500, the evidence was sufficient to support a conviction for criminal trespass to property under O.C.G.A. § 16-7-21(a) as a lesser-included offense of second-degree criminal damage to property. In re A. C.

R-M, 311 Ga. App. 848, 717 S.E.2d 344 (2011).

Evidence of property value.

Opinion by a network manager for the victim that the victim incurred $1,929 in labor expenses for repairs to the cut telephone wire was not competent evidence to support the defendant's conviction for criminal damage to property in the second degree as it was not based on personal knowledge, and the only competent evidence showed $384 was spent to replace materials, which was sufficient for a conviction for criminal trespass to property. Clement v. State, 324 Ga. App. 39, 749 S.E.2d 41 (2013).

Insufficient evidence of property value. — Defendant was entitled to reversal of a conviction for criminal damage to property in the second degree because there was no competent evidence from which the jury could determine that the value of the damage for which the defendant was responsible was in excess of $500, an essential element of the offense, Lenoir v. State, 322 Ga. App. 583, 745 S.E.2d 824 (2013).

Evidence sufficient for conviction.

Evidence was sufficient to sustain the defendant's conviction for second-degree criminal damage to property based on the victim's testimony that the defendant was wearing a dark shirt when the defendant fled through the back door after hearing the knock of the victim's friends, and the male friend testified that moments later, that witness saw a man in a dark shirt shooting at the victim's car parked outside the victim's house, thus, that evidence showed that the defendant was the person who shot at the male friend's car. Jones v. State, 320 Ga. App. 26, 739 S.E.2d 43 (2013).

Evidence was sufficient to convict the defendant of criminal damage to property based on the damage to a neighbor's vehicle parked on the street because the jury was authorized to find that, as a result of the defendant's flight from the intentional criminal actions of firing a firearm into the home of the complainant's mother, the defendant damaged the neighbor's vehicle. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Evidence that the defendant threw a brick at the victim's truck and caused more than $500 in damages was sufficient to support the defendant's conviction for criminal damage to property in the second degree. Fleming v. State, 324 Ga. App. 481, 749 S.E.2d 54 (2013).

Evidence that the victim discovered damage to the victim's home after the defendant had been there supported the criminal damage conviction. Slaughter v. State, 327 Ga. App. 593, 760 S.E.2d 609 (2014).

Cited in Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

16-7-24. Interference with government property.

Cross references. — Damaging or destroying of military property by persons subject to Georgia Code of Military Justice, § 38-2-1108.

JUDICIAL DECISIONS

Jury charge on proximate cause proper. — In a defendant's trial for interference with government property in violation of O.C.G.A. § 16-7-24(a), a trial court did not err in instructing the jury on proximate cause because the statute had no requirement that the defendant intend to cause the damage to the property. That a police officer may fall into the water and damage the officer's equipment was a reasonably probable consequence of the defendant's resisting arrest and struggling with the officer at the side of a swimming pool. Harrison v. State, 313 Ga. App. 861, 722 S.E.2d 774 (2012).

16-7-29. Interference with electronic monitoring devices; "electronic monitoring device" defined; penalty.

JUDICIAL DECISIONS

Juvenile disposition to restrictive custody not an abuse of discretion. — Juvenile court did not abuse the court's discretion in ordering a juvenile to serve 36 months in restrictive custody because the court's findings authorized the court to find that the juvenile's criminal history, repeated violations of probation, removal of the electronic tether, and frequent use of marijuana demonstrated that restrictive custody was in the juvenile's best interests, as well as the community's, and outweighed the absence of any physical harm to the victim of the theft by receiving incident. In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013).

ARTICLE 3

ARSON AND EXPLOSIVES

16-7-60. Arson in the first degree.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EVIDENCE

General Consideration

Merger of counts following conviction. — Because the first degree criminal damage to property was the equivalent of charging the defendant with one of the five methods for proving first degree arson, the trial court erred by failing to merge the two counts upon conviction. Williams v. State, 329 Ga. App. 706, 766 S.E.2d 474 (2014).

Evidence

Sufficient evidence of intent to commit arson.

Defendant's conviction for first degree arson was affirmed because O.C.G.A. § 16-7-60(a)(3) did not require that the fire be set with the intent to defraud the insurer. Here the evidence, including the defendant's statement to the fire investigators, clearly showed that the defendant poured gasoline and lighter fluid throughout the house and garage, and not just on the defendant's person. Barber v. State, 318 Ga. App. 240, 733 S.E.2d 525 (2012).

Evidence sufficient to sustain conviction.

Evidence was sufficient to support convictions for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence was sufficient to convict the defendant of first degree arson, because a rational jury could have found that the defendant knew the victim's house would catch fire when the defendant set the victim's van, parked only six feet from the victims' house, on fire. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

Evidence that fire investigators found

that the fire had two points of origin and that a kitchen drawer, which contained a large box of matches, had been opened before the fire, and the circumstantial evidence that whoever stole the victim's coins had to enter the residence, insofar as the coins were kept in the victim's bedroom, authorized a jury to infer that the fire was set intentionally. Blevins v. State, 291 Ga. 814, 733 S.E.2d 744 (2012).

Evidence that the defendant had money problems, had a drug problem, had removed valuable and irreplaceable items from the home, and made sure the family and pets were out of the home at the time of the fire, authorized the jury to conclude that the defendant knowingly damaged the house, which was mortgaged and insured, by means of fire and supported a conviction for first degree arson. Graf v. State, 327 Ga. App. 598, 760 S.E.2d 613 (2014).

16-7-61. Arson in the second degree.

JUDICIAL DECISIONS

Evidence held sufficient

Evidence was sufficient to support conviction for arson because: (1) one of the defendants placed dozens of calls from the decedent's cell phone as the defendants traveled from Tampa to Atlanta in the decedent's pickup truck; (2) the truck was destroyed in a fire that was started through the use of an accelerant near an apartment complex where the defendants were staying with relatives; (3) the decedent's body was found in the bed of the truck; (4) the decedent had been dead for days before the fire; (5) personal belongings of the decedent were found in the possession of the defendants; and (6) the defendants gave statements to the police. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

Evidence, including defendant's confession, which was corroborated by the victim's boyfriend, who testified to seeing the defendant in the backyard of the victim's home immediately before the boyfriend and the victim became aware that the victim's van was ablaze, was sufficient to support defendant's conviction for second degree arson. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

ARTICLE 4

BOMBS, EXPLOSIVES, AND CHEMICAL AND BIOLOGICAL WEAPONS

16-7-80. Definitions.

JUDICIAL DECISIONS

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which the defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A. §§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

16-7-85. Hoax devices.

JUDICIAL DECISIONS

Evidence sufficient for conviction. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

16-7-88. Possessing, transporting, or receiving explosives or destructive devices with intent to kill, injure, or intimidate individuals or destroy public buildings; sentencing; enhanced penalties.

JUDICIAL DECISIONS

Separate victims. — In a prosecution under O.C.G.A. § 16-7-88(a), a defendant may be convicted separately for possession of a destructive device with the intent to intimidate as to each individual victim who was the specific target of such intent. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Possession of destructive device offense did not merge with aggravated assault. — Defendant's aggravated assault convictions and the defendant's possession of a destructive device convictions did not merge because the possession offense required that the weapon function in a certain way and have certain dimensions, and the assault offense required that the victim was conscious of the risk of immediately receiving a violent injury by use of an offensive weapon. Because each offense required proof of a fact not required for the other, there was no merger under the required evidence test. Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Homemade device was destructive device. — Homemade device that was constructed from a metal pipe, a cap on one end, with a bolt to serve as a detonator or firing pin, and into which defendant had loaded a shotgun shell, and which the defendant used in an attempt to intimidate two victims into paying the defendant money was a destructive device within the meaning of O.C.G.A. §§ 16-7-80(4) and 16-7-88(a). Mason v. State, 312 Ga. App. 723, 719 S.E.2d 581 (2011).

Evidence sufficient to sustain conviction. — Evidence that the defendant was in possession of a pill capsule containing black powder, a low explosive, and had threatened to kill at least one person was sufficient to support a conviction for unlawful possession of a destructive device. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

16-7-95. Civil forfeiture for violations of article; special provisions for destructive material.

(a) As used in this Code section, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(b) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article and any proceeds are declared to be contraband and no person shall have a property right in them.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(d) On application of the seizing law enforcement agency, the superior court may authorize the seizing law enforcement agency to destroy or transfer to any agency of this state or of the United States which can safely store or render harmless any destructive device, explosive, poison gas, or detonator which is subject to forfeiture pursuant to this Code section if the court finds that it is impractical or unsafe for the seizing law enforcement agency to store such destructive device, explosive, poison gas, or detonator. Such application may be made at any time after seizure. Any destruction authorized pursuant to this subsection shall be made in the presence of at least one credible witness or shall be recorded on film, videotape, or other electronic imaging method. Any such film, videotape, or other electronic imaging method shall be admissible as evidence in lieu of such destructive device, explosive, poison gas, or detonator. The court may also direct the seizing agency or an agency to which such destructive device, explosive, poison gas, or detonator is transferred to make a report of the destruction, take samples, or both.

(e) The provisions of subsection (d) of this Code section shall not prohibit an explosive ordnance technician, other law enforcement officer, or fire service personnel from taking action which will render safe an explosive, destructive device, poison gas, or detonator or any object which is suspected of being an explosive, destructive device, poison gas, or detonator without the prior approval of a court when such action is intended to protect lives or property. (Code 1981, § 16-7-95, enacted by Ga. L. 1996, p. 416, § 3; Ga. L. 1997, p. 143, § 16; Ga. L. 1997, p. 512, § 2; Ga. L. 2015, p. 693, § 2-5/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (a) for the former provisions, which read: "All property which is subject to forfeiture pursuant to Code Section 16-13-49 which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or any proceeds derived or realized therefrom shall be considered contraband. Except as provided in subsection (b) of this Code section, such property may be seized and shall be forfeited to the state as provided in Code Section 16-13-49. A property interest shall not be subject to forfeiture under this Code section if the owner of such interest or interest holder establishes any of the provisions of subsection (e) of Code Section 16-13-49."; added present subsections (b) and (c); redesignated former subsections (b) and (c) as present subsections (d) and (e), respectively; and substituted "subsection (d)" for "subsection (b)" near the beginning of subsection (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693,

§ 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

CHAPTER 8

OFFENSES INVOLVING THEFT

Article 1

Theft

Sec.

16-8-5.2. Retail property fencing; civil forfeiture; related matters.
16-8-12. Penalties for theft in violation of Code Sections 16-8-2 through 16-8-9.
16-8-14. Theft by shoplifting.
16-8-14.1. Refund fraud.
16-8-17. Misuse of Universal Product Code labels.
16-8-21. Removal or abandonment of shopping carts.
16-8-22. Cargo theft.
16-8-23. Prohibited uses of fifth wheel.

Article 3

Criminal Reproduction and Sale of Recorded Material

16-8-60. Reproduction of recorded material; transfer, sale, distribution, circulation; civil forfeiture; restitution.

Article 4

Motor Vehicle Chop Shops and Stolen and Altered Property

16-8-85. Civil forfeiture of personal property seized.

Article 5

Residential Mortgage Fraud

16-8-101. Definitions.
16-8-102. Residential mortgage fraud.
16-8-106. Civil forfeiture.

ARTICLE 1

THEFT

16-8-1. Definitions.

JUDICIAL DECISIONS

Failure to allege "property of another". — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," defined in O.C.G.A. § 16-8-1(3), and the defendant could admit all the allegations in the indictment and not be guilty of a crime. Defendant's general demurrer should have been granted. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

16-8-2. Theft by taking.

JUDICIAL DECISIONS

Analysis

General Consideration
Intent
Evidence and Inferences
Jury Instructions
Punishment

General Consideration

No private right of action.

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Failure to allege "property of another". — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," and the defendant could admit all the allegations in the indictment and not be guilty of a crime; likewise, the defendant would not be guilty of theft by taking, which also required that the accused had taken the property of another, O.C.G.A. § 16-8-2. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

Evidence sufficient to establish venue. — Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Venue sufficiently established. — Venue was sufficiently established in Cobb County, Georgia, pursuant to O.C.G.A. § 16-8-11 in the defendant's trial for theft by taking in violation of O.C.G.A. § 16-8-2 because a Secret Service agent testified that during the investigation, the agent discovered that checks disbursed from the victims' loans were sent to the defendant at the defendant's mailbox located in Cobb County. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Venue in theft by taking case. — In an action for theft by taking, venue was properly shown as the trial court was authorized to find that deposit of the subject check had been made by the defendant or someone acting on the defendant's behalf; specifically, the check was deposited into a business account for the defendant's wife and the defendant identified the defendant's new company to the homeowner and the general contractor at a meeting. Erick v. State, 322 Ga. App. 71, 744 S.E.2d 69 (2013).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options be-

General Consideration (Cont'd)

cause they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

State failed to show value of jewelry exceeded $500. — State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Indictment sufficient.

Accusation that alleged that the defendant took "drugs the property of Dr. Bob Lanier having a value of less than $500 with the intention of depriving said owner of said property" was sufficient to allege theft by taking under O.C.G.A. § 16-8-2. State v. Meeks, 309 Ga. App. 855, 711 S.E.2d 403 (2011).

Statute of frauds. — Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 for failing to transmit to a law firm, payments the defendant received for indigent defense work because the statute of frauds, O.C.G.A. § 13-5-30(5), was not implicated; the firm performed the firm's part of the parties' agreement in paying the defendant a salary, providing rent-free office space, and offering administrative support, among other things. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Conduct was criminal conversion under insurance policy. — Trial court erred in granting an insurer's motion for summary judgment in an insured's action alleging breach of contract and bad faith due to the insurer's decision to deny an insurance claim for the purported loss of a vehicle by theft because there was evidence from which a jury could find that the insured's loss was covered by the theft provisions of the policy; there was evidence from which a jury could find the fraudulent intent required to commit theft by conversion in violation of O.C.G.A. § 16-8-4. Byrd v. United Servs. Auto. Ass'n, 317 Ga. App. 280, 729 S.E.2d 522 (2012).

Sufficiency of allegations. — Allegations under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., against a mortgage loan servicer were sufficient to state a claim of theft by taking, deception, and conversion because despite being told that the mortgage loan was fraudulent, the servicer kept the borrowers' money and continuously threatened the borrower's with foreclosure. Kerfoot v. FNF Servicing, Inc., No. 1:13-cv-33, 2013 U.S. Dist. LEXIS 153849 (M.D. Ga. Oct. 25, 2013).

Cited in Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883 (2012); Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012); State v. Bachan, 321 Ga. App. 712, 742 S.E.2d 526 (2013); In the Interest of S. M., 322 Ga. App. 678, 745 S.E.2d 863 (2013); Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013); Pruitt v. State, 323 Ga. App. 689, 747 S.E.2d 694 (2013); In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013); Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

Intent

Evidence of fraudulent intent. — Jury was authorized to infer that the defendant acted with fraudulent intent and to find the defendant guilty of theft by taking because shortly after the defendant received checks for the purpose of starting construction of the victims' modular homes, the defendant abandoned the respective projects without accomplishing any task towards completion of the modular homes; the defendant failed to pay the requisite deposits to obtain the engineering plans for the modular homes. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Intent not shown. — Taxpayers were not entitled to a theft loss under 26 U.S.C.

§ 165(e) with respect to a decline in value of publicly traded stock, as a theft by taking did not occur under O.C.G.A. § 16-8-2 because a corporation did not unlawfully take or appropriate any property from the taxpayer, and there was no evidence of any intention by the corporation or its executives to deprive the taxpery of the property at issue. Although corporate stock, which was in the taxpayer's control after he exercised his stock options, subsequently declined in value, there was no evidence that the corporate executives had any specific intent with regard to the taxpayer to take or appropriate his stock by devaluation or by any other means; rather, the goal of the corporation, including its later-convicted executives, was to increase the value of the stock, including any stock owned and controlled by the taxpayer. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Evidence and Inferences

Venue not established by the evidence. — Sufficient evidence supported defendant's conviction for theft by taking since it showed that defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that defendant exercised any control over the $ 350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Trial court did not err in sustaining objection to cross-examination. — Trial court did not abuse the court's discretion in sustaining the state's objection to the defendant's cross-examination of a company president regarding the president's efforts to reduce tax liability because the defendant never testified that the defendant was being rewarded for helping the president minimize tax liability, and some of the questions to which the state objected related to tax advice the president received from the president's accounting firm, which would have shed no light on the defendant's actions. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Evidence sufficient to support conviction.

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

Evidence was sufficient to convict a defendant of theft by taking from the defendant's employer based on an investigator's testimony that the defendant stole a box of 50 new golf club heads from the employer. The fact that the employer was aware of the planned theft and allowed the theft to proceed did not constitute consent to the taking. Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

Evidence was sufficient to support the defendant's conviction for theft by taking, under O.C.G.A. § 16-8-2, because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an

Evidence and Inferences (Cont'd)

altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 because the evidence was sufficient to prove that the indigent defense money the defendant received was the property of a law firm; an agreement existed between the defendant and the firm for the payment of indigent defense monies to the firm. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Conviction for theft by taking was supported by evidence that the defendant, without permission from the rightful owner, made use of real property by charging rent to tenants and that the value of the property taken was over $500. Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013).

Evidence that the defendant and two others pulled the victim over, took the victim's vehicle and gun, grabbed the victim from behind and struck the victim, and took both the victim's vehicle and gun supported the defendant's convictions for robbery and theft by taking. Chambers v. State, 327 Ga. App. 663, 760 S.E.2d 664 (2014).

Evidence that the defendant's DNA was found on a soda can left inside the victim's house after the burglary, the victim's stolen property was found in a house where the defendant was residing, and the defendant fled when officers tried to arrest the defendant was sufficient so support the defendant's convictions for burglary and theft by taking. Barstad v. State, 329 Ga. App. 214, 764 S.E.2d 453 (2014).

Testimony of a store's loss prevention officer as to the price of the phone that was taken was sufficient to support the defendant's felony conviction. Mendez v. State, 327 Ga. App. 497, 759 S.E.2d 574 (2014).

Evidence was sufficient to convict the defendant of false imprisonment, theft by taking, and three counts of battery because the defendant locked the victim in the victim's room, struck the victim in the face, hit the victim in the back of the head with a blunt object, threw the victim to the floor when the victim tried to escape, and took the victim's cellphone. Pierre v. State, 330 Ga. App. 782, 769 S.E.2d 533 (2015).

Theft by taking involving misuse of checks.

Evidence that the defendant was involved in numerous wire transfers for products or services that were not produced or tendered, thousands of checks made out to different individuals were deposited into the defendant's bank account, and the defendant had two large deposits in the defendant's possession when arrested was sufficient to support the defendant's convictions for theft by taking. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Insufficient amount for felony conviction for theft by taking. — Although defendant was properly convicted of theft by taking, the evidence was insufficient to prove that the theft was of a felony amount since the witness testified to an amount under $100. Harris v. State, 328

Ga. App. 852, 763 S.E.2d 133 (2014).

Theft by taking motor vehicle.

In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601 (2011).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175 (2012).

Jury Instructions

When not error to fail to charge on theft by taking.

Trial court did not err in refusing to give an instruction on theft by taking as a lesser included offense of robbery by sudden snatching as the victim's testimony was sufficient to support the charge of robbery by snatching and the defense was that another individual committed the crime. Copeland v. State, 325 Ga. App. 668, 754 S.E.2d 636 (2014).

Instruction to infer guilt based on recent possession.

While the evidence was sufficient to support the defendant's conviction of theft by taking of a motor vehicle under O.C.G.A. § 16-8-2, the trial court's jury charge—regarding an inference arising from the defendant's recent possession of a stolen truck—effectively shifted the burden of persuasion to the defendant in violation of the due process clause; the error was not harmless as the error applied to an element of the crime that was at issue in the trial: whether the defendant was the person who stole the truck. Ward v. State, 312 Ga. App. 609, 718 S.E.2d 915 (2011).

Charge not warranted.

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Punishment

Alien's sentence and impact on immigration sentence. — After an alien was sentenced to a four-year confinement term, to be served on probation, for a Georgia felony theft by taking conviction, the four-year probationary period the alien served for the sentence counted toward the alien's term of imprisonment for purposes of applying 8 U.S.C. § 1101(a)(43)(G). The Board of Immigration Appeals and the immigration judge correctly found that the alien qualified as an aggravated felon, removable under 8 U.S.C. § 1227(a)(2)(A)(iii). Amaya-Flores v. United States AG, No. 14-10432, 2014 U.S. App. LEXIS 24500 (11th Cir. Dec. 29, 2014) (Unpublished).

Sentence differing from plea agreement. — Following the state agreeing to dismiss the RICO and theft charges against the defendant in exchange for a guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer conditioned upon the defendant testifying truthfully at the trial against the co-defendants, the trial court erred by imposing a sentence upon the defendant which differed from the understood terms of the negotiated plea. Lewis v. State, 330 Ga. App. 412, 767 S.E.2d 771 (2014).

16-8-3. Theft by deception.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Jury Charges
Punishment

General Consideration

No private right of action.

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, the Georgia criminal statutes for trespassing and theft, O.C.G.A. §§ 16-7-21, 16-8-2, and 16-8-3, did not expressly provide for a civil remedy and, thus, a civil remedy could not arise from a violation of those statutes. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Venue.

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified that at the defendant request, the witness placed a check in the mailbox at a rental house, and that occurred the same day defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Defendant's conviction for theft by deception, in violation of O.C.G.A. § 16-8-3, was reversed because no evidence was presented that defendant had exercised control over the wire transfer funds in Morgan County, Georgia, where trial was had on the charge. Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

Application

Evidence did not establish theft by deception.

District court did not err by granting the company summary judgment on Georgia RICO claim because the company produced three sworn statements asserting that the two letters demanding payment and threatening the probationer's arrest were sent because of a clerical error and not with the intent to deceive the probationer into paying money the probationer did not owe. The probationer failed to allege or present any evidence that an employee of the company acted with specific intent to commit theft by deception. McGee v. Sentinel Offender Servs., LLC, 719 F.3d 1236 (11th Cir. 2013).

No evidence services provided worth less than amount paid. — Court of appeals erred by holding that the defendant's felony conviction for theft by deception, based on a failure to fully perform, could stand absent proof of the value of the work performed by the defendant; the conviction as to one count was not supported by evidence as the state failed to show that the services provided were worth less than the amount the defendant was paid. Stratacos v. State, 293 Ga. 401, 748 S.E.2d 828 (2013).

Evidence sufficient to support conviction.

Evidence was sufficient to support the defendant's conviction for theft by deception in violation of O.C.G.A. § 16-8-3(a) because the evidence showed that at a motel the defendant obtained payment for a stolen laptop after representing the laptop to be marketable and not stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Sufficient evidence supported the defendant's theft by deception convictions as there was no requirement that the state prove the value of the work done; the state presented adequate proof that there was a contract price, that the defendant received money under the terms of the contract, that the defendant did not intend to perform all of the contracted services, and that the defendant did not return the money. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Alleging authority to rent property sufficient for conviction. — Conviction for theft by deception was supported by evidence that the defendant deceived tenants by claiming the defendant had authority to rent premises when the defendant did not. Harris v. State, 324 Ga. App. 411, 750 S.E.2d 721 (2013).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

No theft by deception in financier's actions. — After plaintiff limited liability company (LLC1), who sold its interest in another limited liability company (LLC2) to the other members in LLC2 (buyers), and alleged that the buyers defrauded LLC1's members to sign a deed conveying real property from a related leasing company to LLC2 and that the defendant financier, who financed the buyers, aided and abetted a breach of the buyers' fiduciary duty under O.C.G.A. § 14-11-305(1) in connection with that conveyance, the aiding and abetting claim failed because the conveyance had been required for LLC2 to obtain a loan from a bank, and absent the conveyance to enable LLC2 to secure the debt to the bank, the representations of the selling members in the loan application would have been false, subjecting the selling members to liability for bank fraud under 18 U.S.C. § 1344 or theft by deception under O.C.G.A. § 16-8-3. Ledford v. Peeples, 657 F.3d 1222 (11th Cir. 2011).

Jury Charges

Claim of right defense instruction not available. — Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Punishment

Sentence not excessive. — Defendant's sentence for theft by deception for taking $2,611.29 from an elderly victim in a roofing scheme was within the statutory limits, and thus the defendant's sentence of 10 years, with five years probated, was not so disproportionate as to shock the conscience. Jones v. State, 325 Ga. App. 845, 755 S.E.2d 238 (2014).

16-8-4. Theft by conversion.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Sentencing

General Consideration

No private right of action.

Mortgage borrower could not bring civil claims against a loan servicer under O.C.G.A. §§ 16-8-2, 16-8-3, and 16-8-4, which were criminal statutes prohibiting theft by taking, by conversion, and by deception; the statutes did not purport to create a private cause of action. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Statute of limitations violated. — Defendant's convictions for theft by conversion and a RICO violation were reversed because the state failed to carry the state's burden to prove that the defendant was indicted on the counts within the applicable statutes of limitation as the evidence showed that the victims, and therefore the state, had actual knowledge of the offenses more than five years prior to the June 12, 2009 indictment, and the state produced no evidence or argument to the contrary. Jannuzzo v. State, 322 Ga. App. 760, 746 S.E.2d 238 (2013).

Application

Decline in value of stock not a theft. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

Conduct was criminal conversion under insurance policy.

Trial court erred in granting an insurer's motion for summary judgment in an insured's action alleging breach of contract and bad faith due to the insurer's decision to deny an insurance claim for the purported theft loss of a vehicle because there was evidence from which a jury could find that the insured's loss was covered by the theft provisions of the policy; there was evidence from which a jury could find the fraudulent intent required to commit theft by conversion in violation of O.C.G.A. § 16-8-4. Byrd v. United Servs. Auto. Ass'n, 317 Ga. App. 280, 729 S.E.2d 522 (2012).

Evidence sufficient for conviction.

Defendant's conviction for theft by conversion was supported by sufficient evidence because the conviction did not depend on the value of the stolen property, which was relevant only for purposes of distinguishing between a misdemeanor and a felony, therefore, the owner's testimony that the televisions had some value authorized the jury to find the defendant guilty, beyond a reasonable doubt, of misdemeanor theft by conversion. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Sentencing

Restitution order proper.

Evidence was sufficient to support the trial court's determination of the amount of restitution awarded based on the rental agreements requiring the defendant to either make monthly payments on the televisions or return the televisions; the agreements provided for a total $2,797.90 in monthly payments, defendant made only $573.60 in payments, and never returned the televisions. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

16-8-5. Theft of services.

JUDICIAL DECISIONS

Evidence not sufficient. — Taxpayers' complaint for a refund was dismissed, as they were not entitled to a theft loss deduction under 26 U.S.C. § 165(e) with respect to a decline in value of publicly traded stock after the taxpayer husband exercised his stock options because they did not show that they were victims of either a theft by taking, theft by deception, theft by conversion, or theft of services under O.C.G.A. §§ 16-8-2, 16-8-3, 16-8-4, or 16-8-5. The taxpayers were only entitled to capital loss deductions under 26 U.S.C. § 2511. Schroerlucke v. United States, 100 Fed. Cl. 584 (Fed. Cl. 2011).

16-8-5.2. Retail property fencing; civil forfeiture; related matters.

(a) As used in this Code section, the term:

(1) "Retail property" means any new article, product, commodity, item, or component intended to be sold in retail commerce.

(2) "Retail property fence" means a person or entity that buys, sells, transfers, or possesses with the intent to sell or transfer retail property that such person knows or should have known was stolen.

(3) "Value" means the retail value of the item as stated or advertised by the affected retail establishment, to include applicable taxes.

(b) A person commits the offense of retail property fencing when such persons receives, disposes of, or retains retail property which was unlawfully taken or shoplifted over a period not to exceed 180 days with the intent to:

(1) Transfer, sell, or distribute such retail property to a retail property fence; or

(2) Attempt or cause such retail property to be offered for sale, transfer, or distribution for money or other things of value.

(c) Whoever knowingly receives, possesses, conceals, stores, barters, sells, or disposes of retail property with the intent to distribute any retail property which is known or should be known to have been taken or stolen in violation of this subsection with the intent to distribute the proceeds, or to otherwise promote, manage, carry on, or facilitate an offense described in this subsection, shall have committed the offense of retail property fencing.

(d)(1) It shall not be necessary in any prosecution under this Code section for the state to prove that any intended profit was actually realized. The trier of fact may infer that a particular scheme or course of conduct was undertaken for profit from all of the attending circumstances.

(2) It shall not be a defense to violating this Code section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused as being obtained through the commission of a theft.

(e)(1) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them; provided, however, that notwithstanding paragraph (2) of subsection (a) of Code Section 9-16-17, no property of any owner shall be forfeited under this subsection, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(f) Each violation of this Code section shall constitute a separate offense. (Code 1981, § 16-8-5.2, enacted by Ga. L. 2008, p. 679, § 1/HB 1346; Ga. L. 2015, p. 693, § 2-6/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (e) for the former provisions, which read: "Any property constituting proceeds derived from or realized through a violation of this Code section shall be subject to forfeiture to the State of Georgia except that no property of any owner shall be forfeited under this subsection, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner. The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for under Code Section 16-13-49." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

16-8-7. Theft by receiving stolen property.

JUDICIAL DECISIONS

Analysis

General Consideration
Elements of Crime
Included Crimes
Application

General Consideration

Venue proper.

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, where the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Indictment sufficient.

There was no fatal variance between the allegations of theft by receiving and the proof because evidence that the defendant was the original thief was not uncontested; the direct and uncontested evidence did not identify the defendant as the original thief, and while an accomplice testified that the defendant was involved in shoplifting the items, the defendant was not with the accomplice and the codefendant when an officer saw them concealing clothing. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Cited in Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012).

Elements of Crime

Knowledge that goods have been stolen.

Evidence that a defendant possessed a cell phone, a debit card, and women's jewelry, all of which had been stolen a day earlier, while the defendant attempted to climb into a stranger's home, along with evidence that the defendant attempted to flee when caught climbing in the window, was sufficient to support convictions for criminal trespass and felony theft by receiving stolen property in violation of O.C.G.A. §§ 16-7-21(b)(1) and 16-8-7(a). Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

Juvenile's adjudication of delinquency for violating O.C.G.A. § 16-8-7(a), theft by receiving, was supported evidence of flight, the defendant's proximity to stolen items in the woods, the location of stolen items in the defendant's bedroom the day after the theft, and phone photographs of the juvenile with the stolen items including watches and firearms. In the Interest of T. J. J, 329 Ga. App. 537, 765 S.E.2d 704 (2014).

Included Crimes

Armed robbery. — Please disregard the case annotation appearing under this catchline in the 2011 bound volume. The note is incorrect and the case does not stand for the proposition stated therein.

Application

Evidence sufficient for knowledge.

Evidence was sufficient to support the defendant's conviction for theft by receiving stolen property, in violation of O.C.G.A. § 16-8-7(a), because the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt that the defendant had the requisite knowledge that the four-wheeler had been stolen. The witness, who acquired the four-wheeler from a dealer by false pretenses, met with the defendant an hour or two later behind a motel and sold the four-wheeler to the defendant, whom the witness did not know, for cash and drugs in a meeting that was arranged by a third-party. Gillis v. State, 315 Ga. App. 803, 728 S.E.2d 324 (2012).

Evidence insufficient.

Defendant was entitled to reversal of the conviction for theft by receiving because there was no evidence from which a rational trier of fact could have concluded that the defendant knew or should have known that the gun used by the defendant was stolen. Thornton v. State, 292 Ga. 796, 741 S.E.2d 641 (2013).

Evidence sufficient to sustain conviction.

Defendant's conviction for theft by receiving stolen property was supported by the evidence as the state did not rely solely upon mere possession of a stolen dirt bike to support the state's case, but presented additional evidence from which the jury could infer that the defendant knew or should have known that the bike was stolen, specifically, evidence that the brand new dirt bike had been physically abused in a manner inconsistent with ownership in a 24-hour period and that the dirt bike had been borrowed from an alleged friend with an unknown last name who disappeared after the defendant's arrest. Ridgeway v. State, 310 Ga. App. 6, 712 S.E.2d 84 (2011).

Application (Cont'd)

Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got into the defendant's car; the defendant did not stop when police were chasing the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to sustain the codefendants' convictions for theft by receiving stolen property and conspiracy to commit theft by receiving stolen property since the testimony was sufficient to show that items of value, owned by someone other than the codefendants, were recovered from a warehouse over which the codefendants had control. A witness's misstatements concerning the specific address of the warehouse did not render the evidence insufficient as to the location from where the stolen property was recovered. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $500 in value had been stolen from the victim's house, that the defendant had acquired possession of it the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

Defendant's conviction for theft by receiving a stolen automobile was supported by evidence that the defendant had been driving a car without an ignition, which a witness assumed was stolen, and that the defendant and an accomplice went to see someone about a stolen automobile, which the accomplice and the defendant were planning to give back to the owner for a reward. Toro v. State, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

Evidence was sufficient to find the defendant guilty of theft by receiving stolen property under O.C.G.A. § 16-8-7, when the defendant made contradictory statements to the investigator concerning whether the defendant had sold a gun to anyone and the defendant's statement that the defendant had acquired the shotgun two years earlier from a co-worker conflicted with the victim's testimony as to when the victim's truck was broken into and when the shotgun was stolen. Those conflicts in evidence created credibility issue regarding the circumstances surrounding the defendant's possession of the shotgun, which the fact finder resolved adversely to the defendant. Bradley v. State, 317 Ga. App. 477, 731 S.E.2d 371 (2012).

Evidence that the defendant possessed items stolen from a second victim and others was sufficient to support the defendant's conviction for theft by receiving the second victim's stolen property. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

Insufficient evidence defendant knew gun was stolen. — Defendant was entitled to reversal of the defendant's conviction for theft by receiving because there was only evidence that the defendant found a gun that was reported stolen, not that the defendant knew the gun was stolen. Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013).

There was insufficient evidence to show that the defendant was guilty of theft, etc.

Evidence was insufficient to support the defendant's convictions for theft by receiving stolen property, O.C.G.A. § 16-8-7(a), because there was uncontroverted direct evidence that the defendant was the original thief, and no evidence identified any other person other than the defendant; there were video and still photographs, clearly revealing the defendant's unob-

structed face and body from several angles, depicting the defendant as the taker of the property; not the receiver. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Because there was no competent evidence to show that a memory card had been stolen, as the third victim failed to testify, only that the memory card had been reported stolen, the defendant's conviction for theft by receiving stolen property as to that victim could not stand. Reeves v. State, 329 Ga. App. 470, 765 S.E.2d 407 (2014).

16-8-9. Theft by bringing stolen property into state.

JUDICIAL DECISIONS

Cited in Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013); In the Interest of D. C., 324 Ga. App. 95, 748 S.E.2d 514 (2013).

16-8-10. Affirmative defenses to prosecution for violation of Code Sections 16-8-2 through 16-8-7.

JUDICIAL DECISIONS

Claim of right.

Defendant was properly convicted of felony theft by taking in violation of O.C.G.A. § 16-8-2 because there was evidence that the defendant intended not to transmit, to a law firm, payments the defendant received for indigent defense work; the defendant's failure to deny the debt and promises to pay, coupled with evidence of billing, timekeeping, and collection practices, provided evidence from which a jury could infer that the defendant was not acting under a claim of right pursuant to O.C.G.A. § 16-8-10(2) and that the defendant had the intent required to commit theft by taking. Clarke v. State, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Denial not affirmative defense.

Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons the defendant was prevented from completing the jobs, and that the defendant had composed a list with the defendant's pastor of how much work was done on each job, and how much the defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

16-8-11. Venue for purposes of Code Sections 16-8-2 through 16-8-9 and 16-8-13 through 16-8-15.

JUDICIAL DECISIONS

Venue in theft by taking case. — In an action for theft by taking, venue was properly shown as the trial court was authorized to find that deposit of the subject check had been made by the defendant or someone acting on the defendant's behalf; specifically, the check was deposited into a business account for the defendant's wife and the defendant identified the defendant's new company to the homeowner and the general contractor at a meeting. Erick v. State, 322 Ga. App. 71, 744 S.E.2d 69 (2013).

Venue was proper in the county, etc.

Evidence was sufficient to establish venue in Hall County for a theft by deception charge because a witness testified

that at the defendant's request, the witness placed a check in the mailbox at a rental house, and that occurred the same day defendant cashed the check; the police officer who responded to the witness's call testified that the house was located in Hall County. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Venue in theft case was in the county where defendant exercised control over the items at issue.

Defendant's conviction for theft by deception, in violation of O.C.G.A. § 16-8-3, was reversed because no evidence was presented that the defendant had exercised control over the wire transfer funds in Morgan County, Georgia, where the trial was had on the charge. Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

Sufficient evidence supported defendant's conviction for theft by taking since the evidence showed that the defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that the defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that the defendant exercised any control over the $350,000 in Dodge County. Davis v. State, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Establishment of venue.

State clearly demonstrated that venue was proper in Dawson County, Georgia for the defendant's trial for misdemeanor theft by receiving, O.C.G.A. § 16-8-7, where the defendant began driving away in a vehicle containing stolen goods. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence was sufficient to establish venue beyond a reasonable doubt and to sustain the defendant's conviction for theft by taking because the state established that the defendant wrote checks at a company's county office, the amount of the check cashed exceeded the amount entered into the computer register, and the total amount of the difference was more than $500; the company president testified that the company was located in the county where the defendant's trial was held and that the defendant worked at the company office and then began working from home. Gautreaux v. State, 314 Ga. App. 103, 722 S.E.2d 915 (2012).

Venue was sufficiently established in Cobb County, Georgia, pursuant to O.C.G.A. § 16-8-11 in the defendant's trial for theft by taking in violation of O.C.G.A. § 16-8-2 because a Secret Service agent testified that during the investigation, the agent discovered that checks disbursed from the victims' loans were sent to the defendant at the defendant's mailbox located in Cobb County. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

16-8-12. Penalties for theft in violation of Code Sections 16-8-2 through 16-8-9.

(a) A person convicted of a violation of Code Sections 16-8-2 through 16-8-9 shall be punished as for a misdemeanor except:

(1)(A) If the property which was the subject of the theft exceeded $24,999.99 in value, by imprisonment for not less than two nor more than 20 years;

(B) If the property which was the subject of the theft was at least $5,000.00 in value but was less than $25,000.00 in value, by imprisonment for not less than one nor more than ten years and, in the discretion of the trial judge, as for a misdemeanor;

(C) If the property which was the subject of the theft was at least $1,500.01 in value but was less than $5,000.00 in value, by

imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor; and

(D) If the defendant has two prior convictions for a violation of Code Sections 16-8-2 through 16-8-9, upon a third conviction or subsequent conviction, such defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years and, in the discretion of the trial judge, as for a misdemeanor;

(2) If the property was any amount of anhydrous ammonia, as defined in Code Section 16-11-111, by imprisonment for not less than one nor more than ten years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(3) If the property was taken by a fiduciary in breach of a fiduciary obligation or by an officer or employee of a government or a financial institution in breach of his or her duties as such officer or employee, by imprisonment for not less than one nor more than 15 years, a fine not to exceed the amount provided by Code Section 17-10-8, or both;

(4) If the crime committed was a violation of Code Section 16-8-2 and if the property which was the subject of the theft was a memorial to the dead or any ornamentation, flower, tree, or shrub placed on, adjacent to, or within any enclosure of a memorial to the dead, by imprisonment for not less than one nor more than three years. Nothing in this paragraph shall be construed as to cause action taken by a cemetery, cemetery owner, lessee, trustee, church, religious or fraternal organization, corporation, civic organization, or club legitimately attempting to clean, maintain, care for, upgrade, or beautify a grave, gravesite, tomb, monument, gravestone, or other structure or thing placed or designed for a memorial of the dead to be a criminal act;

(5)(A) The provisions of paragraph (1) of this subsection notwithstanding, if the theft or unlawful activity was committed in violation of subsection (b) of Code Section 10-1-393.5 or in violation of subsection (b) of Code Section 10-1-393.6 or while engaged in telemarketing conduct in violation of Chapter 5B of Title 10, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor; provided, however, that any person who is convicted of a second or subsequent offense under this paragraph shall be punished by imprisonment for not less than one year nor more than 20 years.

(B) Subsequent offenses committed under this paragraph, including those which may have been committed after prior felony convictions unrelated to this paragraph, shall be punished as provided in Code Section 17-10-7;

(6)(A) As used in this paragraph, the term:

(i) "Destructive device" means a destructive device as such term is defined by Code Section 16-7-80.

(ii) "Explosive" means an explosive as such term is defined by Code Section 16-7-80.

(iii) "Firearm" means any rifle, shotgun, pistol, or similar device which propels a projectile or projectiles through the energy of an explosive.

(B) If the property which was the subject of the theft offense was a destructive device, explosive, or firearm, by imprisonment for not less than one nor more than ten years;

(7) If the property which was the subject of the theft is a grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, and if such grave marker, monument, memorial, plaque, or marker is privately owned or located on privately owned land, by imprisonment for not less than one nor more than three years if the value of the property which was the subject of the theft is $1,000.00 or less, and by imprisonment for not less than three years and not more than five years if the value of the property which was the subject of the theft is more than $1,000.00;

(8) Reserved; or

(9) Notwithstanding the provisions of paragraph (1) of this subsection, if the property of the theft was regulated metal property, as such term is defined in Code Section 10-1-350, and the sum of the aggregate amount of such property, in its original and undamaged condition, plus any reasonable costs which are or would be incurred in the repair or the attempt to recover any property damaged in the theft or removal of such regulated metal property, exceeds $500.00, by imprisonment for not less than one nor more than five years, a fine of not more than $5,000.00, or both.

(b) Except as otherwise provided in paragraph (5) of subsection (a) of this Code section, any person who commits the offense of theft by deception when the property which was the subject of the theft exceeded $500.00 in value and the offense was committed against a person who is 65 years of age or older shall, upon conviction thereof, be

punished by imprisonment for not less than five nor more than ten years.

(c) Where a violation of Code Sections 16-8-2 through 16-8-9 involves the theft of a growing or otherwise unharvested commercial agricultural product which is being grown or produced as a crop, such offense shall be punished by a fine of not less than $1,000.00 and not more than the maximum fine otherwise authorized by law. This minimum fine shall not in any such case be subject to suspension, stay, or probation. This minimum fine shall not be required in any case in which a sentence of confinement is imposed and such sentence of confinement is not suspended, stayed, or probated; but this subsection shall not prohibit imposition of any otherwise authorized fine in such a case. (Code 1933, § 26-1812, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 841, § 4; Ga. L. 1978, p. 1457, § 1; Ga. L. 1981, p. 1552, § 1; Ga. L. 1981, p. 1576, § 1; Ga. L. 1982, p. 1371, § 2; Ga. L. 1984, p. 900, § 3; Ga. L. 1986, p. 1228, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1994, p. 359, § 1; Ga. L. 1996, p. 231, § 4; Ga. L. 1996, p. 416, § 4; Ga. L. 1997, p. 1507, § 4; Ga. L. 1998, p. 643, § 5; Ga. L. 2000, p. 1085, § 3; Ga. L. 2001, p. 1153, § 2; Ga. L. 2003, p. 177, § 1; Ga. L. 2004, p. 1072, § 2; Ga. L. 2006, p. 329, § 1/HB 1275; Ga. L. 2007, p. 650, § 4/SB 203; Ga. L. 2009, p. 731, § 4/SB 82; Ga. L. 2012, p. 112, § 1-2/HB 872; Ga. L. 2012, p. 899, § 3-2/HB 1176; Ga. L. 2014, p. 195, § 2/HB 749.)

The 2012 amendments. — The first 2012 amendment, effective July 1, 2012, substituted "regulated metal property, as such term is" for "ferrous metals or regulated metal property, as such terms are" near the beginning of paragraph (a)(9). See editor's note for applicability. The second 2012 amendment, effective July 1, 2012, in subsection (a), designated the existing provisions of paragraph (a)(1) as subparagraph (a)(1)(A) and, in subparagraph (a)(1)(A), substituted "$24,999.99 in value, by imprisonment for not less than two nor more than 20 years" for "$500.00 in value, by imprisonment for not less than one nor more than ten years or, in the discretion of the trial judge, as for a misdemeanor"; added subparagraphs (a)(1)(B) through (a)(1)(D); deleted "if the property which was the subject of the theft was a motor vehicle or was a motor vehicle part or component which exceeded $100.00 in value or" following "subsection notwithstanding," near the beginning of subparagraph (a)(5)(A); in paragraph (a)(7), twice substituted "$1,000.00" for "$300.00"; in paragraph (a)(8), added a comma following "including" in the first sentence, added a comma following "limitation" in the first and second sentences, and added a comma following "includes" in the second sentence; and substituted "$1,000.00" for "$500.00" in the first sentence of subsection (c). See editor's note for applicability.

The 2014 amendment, effective July 1, 2014, substituted the present provisions of paragraph (a)(8) for the former provisions, which read: "If the property that was the subject of the theft was a vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including, without limitation, any such trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, by imprisonment for not less than three years nor more than ten years, a fine not less than $5,000.00 nor more than $50,000.00, and, if applicable, the revocation of the defendant's commercial driver's license in accordance with Code Section 40-5-151, or any combination of such penalties. For purposes of this paragraph, the

term 'vehicle' includes, without limitation, any railcar; or". See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 112, § 4-1(a)/HB 872, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses committed on or after July 1, 2012.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all offenses committed on or after such date."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 238 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Value

General Consideration

Illustrative cases.

Evidence was sufficient to support the defendant's conviction for felony theft by receiving stolen property in violation of O.C.G.A. § 16-8-7(a) because the jury was authorized to find that a ruby and diamond ring exceeding $ 500 in value had been stolen from the victim's house, that the defendant had acquired possession of the ring, and that the defendant knew or should have known the ring was stolen; although the defendant asserted that the ring found in the defendant's possession did not belong to the victim, that was a question for the jury as the trier of fact, and the jury had no obligation to believe the defendant's claim. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

Restitution order proper. — Evidence was sufficient to support the trial court's determination of the amount of restitution awarded based on the rental agreements requiring the defendant to either make monthly payments on the televisions or return the television; the agreements provided for a total $2,797.90 in monthly payments, the defendant made only $573.60 in payments, and never returned the televisions. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Sentence appropriate.

Defendant's sentence for theft by deception for taking $2,611.29 from an elderly victim in a roofing scheme was within the statutory limits, and thus the defendant's sentence of 10 years, with five years probated, was not so disproportionate as to shock the conscience. Jones v. State, 325 Ga. App. 845, 755 S.E.2d 238 (2014).

Value

Applicable statutory dollar amount.

Evidence was sufficient for the jury to find that the items appellant stole exceeded $500 in value when the evidence showed that appellant had taken two gaming stations valued at $150 each, DVDs collectively valued at $175, as well as earrings and other items from the victim. Pulley v. State, 291 Ga. 330, 729 S.E.2d 338 (2012).

Classification of punishment determined by value of property taken.

Defendant's conviction for theft by conversion was supported by sufficient evidence because the conviction did not depend on the value of the stolen property, which was relevant only for purposes of

distinguishing between a misdemeanor and a felony, therefore, the owner's testimony that the televisions had some value authorized the jury to find the defendant guilty, beyond a reasonable doubt, of misdemeanor theft by conversion. Williams v. State, 328 Ga. App. 898, 763 S.E.2d 280 (2014).

Valuation of property.

Testimony of a store's loss prevention officer as to the price of the phone that was taken was sufficient to support the defendant's felony conviction. Mendez v. State, 327 Ga. App. 497, 759 S.E.2d 574 (2014).

Although the defendant was properly convicted of theft by taking, the evidence was insufficient to prove that the theft was of a felony amount since the witness testified to an amount totally under $100. Harris v. State, 328 Ga. App. 852, 763 S.E.2d 133 (2014).

Proof of value of stolen property.

Evidence from a plant employee that golf club heads stolen by an employee cost $203 each wholesale and that their value was $203 each was sufficient for the trial court to determine that the value of the items stolen at the time and place of the theft exceeded $500 for purposes of sentencing under O.C.G.A. § 16-8-12(a)(1). Baker v. State, 311 Ga. App. 532, 716 S.E.2d 580 (2011).

State failed to establish that the value of stolen jewelry exceeded $500 as required for felony theft by taking. There was evidence that the rings were part of an entire lot of jewelry — including necklaces, bracelets, rings, and pendants — that the victim had previously purchased from the pawn shop for $10,000. The only evidence related to the specific items taken by the defendant showed that the defendant pawned nine rings for $275. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence from a theft victim as to the value of a stolen cell phone and items of jewelry that the victim or the victim's spouse had purchased was sufficient to establish that the stolen items' value exceeded $ 500 and was sufficient to support a felony sentence. Reese v. State, 313 Ga. App. 746, 722 S.E.2d 441 (2012).

16-8-13. Theft of trade secrets.

JUDICIAL DECISIONS

Cited in Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

16-8-14. Theft by shoplifting.

(a) A person commits the offense of theft by shoplifting when such person alone or in concert with another person, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:

(1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;

(2) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;

(3) Transfers the goods or merchandise of any store or retail establishment from one container to another;

(4) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or

(5) Wrongfully causes the amount paid to be less than the merchant's stated price for the merchandise.

(b)(1) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is $500.00 or less in value shall be punished as for a misdemeanor; provided, however, that:

(A) Upon conviction of a second offense for shoplifting, where the first offense is either a felony or a misdemeanor, as defined by this Code section, in addition to or in lieu of any imprisonment which might be imposed, the defendant shall be fined not less than $500.00, and the fine shall not be suspended or probated;

(B) Upon conviction of a third offense for shoplifting, where the first two offenses are either felonies or misdemeanors, or a combination of a felony and a misdemeanor, as defined by this Code section, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, diversion center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to either such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld; and

(C) Upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this Code section, the defendant commits a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

(2) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(3) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony

and shall be punished by imprisonment for not less than one nor more than ten years.

(4) A person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken during a period of 180 days and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(c) In all cases involving theft by shoplifting, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property, or duly identified photographs thereof, shall be prima-facie evidence of value and ownership of the property.

(d) Subsection (b) of this Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3, relative to punishment for misdemeanors. (Ga. L. 1957, p. 115, §§ 1, 3; Code 1933, § 26-1802.1, enacted by Ga. L. 1978, p. 2257, § 2; Ga. L. 1983, p. 457, § 1; Ga. L. 1997, p. 1394, § 1; Ga. L. 1998, p. 578, § 1; Ga. L. 2000, p. 870, § 1; Ga. L. 2012, p. 899, § 3-3/HB 1176.)

The 2012 amendment, effective July 1, 2012, in the introductory paragraph of subsection (a), substituted "such person" for "he" near the beginning and inserted "or her" near the middle; substituted "$500.00" for "$300.00" in paragraphs (b)(1) and (b)(2); substituted "$500.00" for "$250.00" in subparagraph (b)(1)(A); in paragraph (b)(3), inserted "the aggregate value of" near the middle and substituted "$500.00" for "$100.00"; and added paragraph (b)(4). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Article: Immigration," see 65 Emory L. J. 1039 (2014).

JUDICIAL DECISIONS

Relationship with federal immigration law. — Conviction under the Georgia statute for shoplifting with intent to appropriate merchandise to one's own use without paying for the merchandise, under O.C.G.A. § 16-8-14, does not constitute a theft offense within the meaning of 8 U.S.C. § 1101(a)(43)(G). The Georgia statute punishes both conduct that qualifies as a theft offense and conduct that

does not; therefore, the Georgia statute is divisible. Ramos v. United States AG, 709 F.3d 1066 (11th Cir. 2013).

Sufficiency of proof of value.

Any error in allowing the jury to consider the wholesale value of the phone stolen from the store was harmless, because that amount exceeded $300. Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014).

Variance between allegation and proof.

Fatal variance did not exist between the indictment and the evidence based on the indictment stating a cellphone was shoplifted whereas it was actually a tablet because the indictment adequately informed the defendant of the charge, and to the extent the indictment varied from the case, it was immaterial and did not affect the defendant's ability to defend. Leonard v. State, 326 Ga. App. 209, 756 S.E.2d 293 (2014).

Effect of prior convictions.

Trial court properly sentenced the defendant as a recidivist under O.C.G.A. § 17-10-7 following a shoplifting conviction because the record of the plea proceeding in a prior case wherein the defendant pled guilty belied the claim that the defendant was not adequately advised of the right to a jury trial; thus, the trial court did not err in considering, for purposes of sentencing, that prior conviction. Foster v. State, 319 Ga. App. 815, 738 S.E.2d 651 (2013).

In applying the statute for imposition of recidivist sentencing, based on the defendant's four prior felony drug convictions, the trial court had no discretion with regard to the term of the sentence and was required to sentence the defendant to 10 years, which was the maximum sentence for theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Recidivist sentence improper. — Trial court erred in sentencing the defendant as a recidivist to 10 years imprisonment under O.C.G.A. § 17-10-7 for theft by shoplifting in violation of O.C.G.A. § 16-8-14 because the defendant demonstrated that the trial court did not exercise the court's discretion to consider probating or suspending a portion of the sentence after the defendant served one year pursuant to § 16-8-14(b)(1)(C). Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Jury instructions on mere presence. — Defendant was not entitled to a jury instruction on mere presence because mere presence was not recognized as a separate and discrete defense to a criminal charge; and the evidence showed that the defendant was not merely present but was the sole participant in the crime of theft by shoplifting. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Evidence sufficient to support conviction.

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for felony theft by shoplifting because in addition to an accomplice's testimony, and the testimony from a store employee that the retrieved items were valued at more than $400, the codefendant's furtive behavior observed by a deputy in the store and the act of tossing clothing from the passenger window of a car were all evidence from which a jury could reasonably infer the codefendant's guilt. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Trial court did not err in denying the codefendant's motion for directed verdict as to the codefendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

Evidence that the defendant made a false statement that the merchandise had been paid for and attempted to obtain a refund or merchandise voucher was sufficient to support the defendant's conviction for theft by shoplifting; the jury was authorized to disbelieve testimony that the defendant was unaware that the gift card reflected a value greater than that of the rackets actually purchased. Grady v. State, 319 Ga. App. 894, 743 S.E.2d 22 (2013).

Evidence was sufficient to defeat the defendant's motion for a directed verdict on the felony shoplifting charge as the state introduced circumstantial evidence that the defendant took possession of the phone by removing it from the display and

placed it in defendant's pocket before leaving the store and the phone was missing from the store until it was apparently left there by another person around the time the defendant was scheduled to meet with police. Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014).

Evidence was sufficient to sustain the defendant's conviction for theft by shoplifting because a person was observed on the store video monitoring system putting several items in a bag; the person then walked out of the store without paying for the items; when told to stop the person, identified as the defendant, fled toward a wood line; and, when apprehended, the defendant was in possession of a store bag containing several items from the store with price tags attached and no receipt. Allen v. State, 325 Ga. App. 752, 754 S.E.2d 795 (2014).

Sufficient evidence supported the defendant's convictions for aggravated assault with a knife and theft by shoplifting based on the testimony of the loss prevention officer, who witnessed the defendant take the watch, and the testimony of both the loss prevention officer and the store manager, who indicated that the defendant had a knife. Broom v. State, 331 Ga. App. 564, 769 S.E.2d 400 (2015).

16-8-14.1. Refund fraud.

(a)(1) It shall be unlawful for a person to give a false or fictitious name or address or to give the name or address of another person without that person's approval or permission for the purpose of obtaining a refund from a store or retail establishment for merchandise.

(2) It shall be unlawful for a person to obtain a refund in the form of cash, check, credit on a credit or debit card, a merchant gift card, or credit in any other form from a store or retail establishment using a driver's license not issued to such person, a driver's license containing false information, an identification card containing false information, an altered identification card, or an identification card not issued to such person.

(b) A person who violates subsection (a) of this Code section shall be guilty of refund fraud and, upon conviction, except as provided in subsection (c) of this Code section, shall:

(1) When the property which was the subject of the fraud is $500.00 or less in value, be punished as for a misdemeanor;

(2) When the property which was the subject of the fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years;

(3) When the property which was the subject of the fraud is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years; and

(4) When the property which was the subject of the fraud is taken during a period of 180 days and when the aggregate value of the

property which was the subject of each fraud exceeds $500.00 in value, be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(c)(1) Upon conviction of a second offense for a violation of any provision of this Code section, in addition to or in lieu of any imprisonment which might be imposed, the defendant shall be fined not less than $500.00, and the fine shall not be suspended or probated.

(2) Upon conviction of a third offense for a violation of any provision of this Code section, the defendant shall be guilty of a felony and, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, diversion center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to either such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld.

(3) Upon conviction of a fourth or subsequent offense for a violation of any provision of this Code section, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

(d) In all cases involving refund fraud, the term "value" means the actual retail price of the property at the time and place of the offense. The unaltered price tag or other marking on property, or duly identified photographs thereof, shall be prima-facie evidence of value and ownership of the property.

(e) Subsection (b) of this Code section shall not affect the authority of a judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3, relative to punishment for misdemeanors. (Code 1981, § 16-8-14.1, enacted by Ga. L. 2014, p. 404, § 1-1/SB 382; Ga. L. 2015, p. 5, § 16/HB 90.)

Effective date. — This Code section became effective July 1, 2014. See editor's note for applicability.

The 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (c)(1) and substituted a period for "; and" at the end of paragraph (c)(2).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the semicolon at the end of paragraph (c)(3) was changed to a period.

Editor's notes. — Ga. L. 2014, p. 404,

§ 3-1/SB 382, not codified by the General Assembly, provides, in part, that this Code section shall apply to all conduct occurring on or after July 1, 2014.

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-11-130.2, 16-11-90(b), 16-8-14.1(a), 16-8-22, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-8-15. Conversion of payments for real property improvements.

JUDICIAL DECISIONS

Prosecution did not violate bankruptcy discharge injunction. — Continuation of criminal prosecution was not solely to collect a debt in violation of a discharge order in a Chapter 7 debtor's case as the debtor provided no evidence to support a finding that the prosecution was brought in bad faith, and the alleged crime, theft by conversion in violation of Georgia law, was more than a failure to pay a debt. Further, it was the state that decided to continue the prosecution by conducting the state's own investigation, obtaining a warrant, and submitting evidence to the grand jury. Buckley v. Patel (In re Buckley), No. 14-5330, 2015 Bankr. LEXIS 660 (Bankr. N.D. Ga. Feb. 13, 2015).

Consent judgment entered against the debtor with respect to funds for a construction project did not establish nondischargeability for willful conversion of payments for real property improvements because the consent judgment did not establish a constructive trust in favor of the creditor for the debtor's willful conversion under state laws as there was no evidence the debtor was guilty of a violation of a criminal statute and there was no civil action to remedy the harm from the particular criminal law violation. Pioneer Constr., Inc. v. May (In re May), 518 B.R. 99 (Bankr. S.D. Ga. 2014).

Cited in Davis v. State, 322 Ga. App. 826, 747 S.E.2d 19 (2013).

16-8-16. Theft by extortion.

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, O.C.G.A. § 16-10-2(a)(1), or extortion, O.C.G.A. § 16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

16-8-17. Misuse of Universal Product Code labels.

(a)(1) Except as provided in paragraph (2) of this subsection, a person who, with intent to cheat or defraud a retailer, possesses, uses,

utters, transfers, makes, alters, counterfeits, or reproduces a retail sales receipt or a Universal Product Code label which results in a theft of property which exceeds $500.00 in value commits a felony and shall be punished by imprisonment for not less than one nor more than three years or by a fine or both.

(2) A person convicted of a violation of paragraph (1) of this subsection, when the property which was the subject of the theft resulting from the unlawful use of retail sales receipts or Universal Product Code labels is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds $500.00 in value, commits a felony and shall be punished by imprisonment for not less than one nor more than ten years.

(b) A person who, with intent to cheat or defraud a retailer, possesses 15 or more fraudulent retail sales receipts or Universal Product Code labels or possesses a device the purpose of which is to manufacture fraudulent retail sales receipts or Universal Product Code labels shall be guilty of a felony and punished by imprisonment for not less than one nor more than ten years. (Code 1981, § 16-8-17, enacted by Ga. L. 2000, p. 870, § 2; Ga. L. 2001, p. 4, § 16; Ga. L. 2012, p. 899, § 3-4/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted "$500.00" for "$300.00" near the end of paragraph (a)(1); near the end of paragraph (a)(2), inserted "aggregate value of the" and substituted "$500.00" for "$100.00"; and substituted "shall" for "will" near the end of subsection (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

16-8-18. Entering automobile or other motor vehicle with intent to commit theft or felony.

JUDICIAL DECISIONS

Evidence sufficient for conviction.

Evidence was sufficient to convict a defendant of theft in violation of O.C.G.A. § 16-8-18 as a party to the crime under O.C.G.A. § 16-2-20, given that the defendant drove the defendant's truck to a pharmacy, waited with the truck idling while the defendant's friend got out, smashed a car window, and stole a purse, then drove away with the friend and hid the friend at the defendant's apartment when the police came. Rinks v. State, 313 Ga. App. 37, 718 S.E.2d 359 (2011).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automo-

bile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Defendant's act of repeatedly pulling at a vehicle's door handle in a sorority house parking lot at 2:00 A.M. amounted to more than a mere preparatory act, and was instead an act proximately leading to the consummation of the crime of entering an automobile, supporting the defendant's conviction for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

RESEARCH REFERENCES

ALR. — What constitutes "aggravated felony" for which alien can be deported or removed under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C. § 1227(a)(2)(A)(iii)) — Theft or burglary offenses under 8 U.S.C. § 1101(a)(43)(G), 62 ALR Fed. 2d 255.

16-8-21. Removal or abandonment of shopping carts.

(a) As used in this Code section, the term "shopping cart" means those pushcarts of the type which are commonly provided by grocery stores, drugstores, or other merchant stores or markets for the use of the public in transporting commodities in stores and markets and incidentally from the store to a place outside the store.

(b) It shall be unlawful for any person to remove a shopping cart from the premises of the owner of such shopping cart without the consent, given at the time of such removal, of the owner or of his or her agent, servant, or employee. For the purpose of this Code section, the premises shall include all the parking area set aside by the owner or on behalf of the owner for the parking of cars for the convenience of the patrons of the owner.

(c) It shall be unlawful for any person to abandon a shopping cart upon any public street, sidewalk, way, or parking lot other than a parking lot on the premises of the owner.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1975, p. 848, § 1; Ga. L. 2012, p. 162, § 1/HB 1093.)

The 2012 amendment, effective April 16, 2012, inserted "the term" near the beginning of subsection (a); in the first sentence of subsection (b), deleted ", posted as provided in subsection (d) of this Code section," following "the premises" and inserted "or her"; deleted former subsection (d), which read: "The owner of the store in which the shopping cart is used shall post in at least three prominent places in his store and at each exit therefrom a printed copy of this Code section, which copy shall be printed in type no smaller than 12 points."; redesignated for-

mer subsection (e) as present subsection (d); and deleted "subsection (b) or (c) of" following "violates" near the beginning of present subsection (d).

16-8-22. Cargo theft.

(a) For purposes of this Code section, the term "vehicle" includes, without limitation, any railcar.

(b) Notwithstanding any provision of this article to the contrary, a person commits the offense of cargo theft when he or she unlawfully takes or, being in lawful possession thereof, unlawfully appropriates:

(1) Any vehicle engaged in commercial transportation of cargo or any appurtenance thereto, including, without limitation, any trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is the property of another with the intention of depriving such other person of the property, regardless of the manner in which the property is taken or appropriated; or

(2) Any trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is deployed by or used by a law enforcement agency, which is the property of another with the intention of depriving such other person of the property, regardless of the manner in which the property is taken or appropriated.

(c) The value of a vehicle engaged in commercial transportation of cargo and any appurtenance thereto and the cargo being transported which is taken or unlawfully appropriated shall be based on the fair market value of such vehicle, appurtenances, and cargo taken or unlawfully appropriated.

(d)(1) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of less than $10,000.00, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(2) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of at least $10,000.00 but less than $1 million, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than five nor more than 25 years, a fine of not less than $50,000.00 nor more than $1 million, or both.

(3) If the property taken is one or more controlled substances as defined in Code Section 16-13-21 with a collective value of $1 million or more, a person convicted of a violation of this Code section shall be

punished by imprisonment for not less than ten nor more than 30 years, a fine of not less than $100,000.00 nor more than $1 million, or both.

(e)(1) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of $1,500.00 or less, a person convicted of a violation of this Code section shall be punished as for a misdemeanor.

(2) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of more than $1,500.00 but less than $10,000.00, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(3) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of at least $10,000.00 but less than $1 million, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than five nor more than 20 years, a fine of not less than $50,000.00 nor more than $1 million, or both.

(4) Except as otherwise provided in subsection (d) of this Code section, if the property taken has a collective value of $1 million or more, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than ten nor more than 20 years, a fine of not less than $100,000.00 nor more than $1 million, or both.

(f) Notwithstanding subsections (d) and (e) of this Code section, if the property taken is a trailer, semitrailer, container, or other associated equipment, or the cargo being transported therein or thereon, which is deployed by or used by a law enforcement agency, regardless of its value, a person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both.

(g) A person convicted of a violation of this Code section may also be punished by, if applicable, the revocation of the defendant's commercial driver's license in accordance with Code Section 40-5-151. (Code 1981, § 16-8-22, enacted by Ga. L. 2014, p. 195, § 1/HB 749.)

Effective date. — This Code section became effective July 1, 2014. See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the subsection (g) designation was substituted for the second subsection (e) designation originally enacted.

Editor's notes. — Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall

apply to all offenses committed on or after such date. The enactment of Code Sections 16-8-22 and 16-8-23 shall not affect any prosecutions for acts occurring before the effective date of Code Sections 16-8-22 and 16-8-23 and shall not act as an abatement of any such prosecutions."

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-11-130.2, 16-11-90(b), 16-8-14.1(a), 16-8-22, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-8-23. Prohibited uses of fifth wheel.

(a) For the purposes of this Code section, the term "fifth wheel" means a device mounted on a truck tractor or similar towing vehicle, including, but not limited to, a converter dolly, which interfaces with and couples to the upper coupler assembly of a semitrailer.

(b) It shall be unlawful for any person to modify, alter, attempt to alter, and, if altered, sell, possess, offer for sale, move, or cause to be moved on the highways of this state a device known as a fifth wheel or the antitheft locking device attached to the fifth wheel with the intent to use the fifth wheel to commit or attempt to commit cargo theft as defined in Code Section 16-8-22.

(c) A person convicted of a violation of this Code section shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $10,000.00 nor more than $100,000.00, or both. (Code 1981, § 16-8-23, enacted by Ga. L. 2014, p. 195, § 1/HB 749.)

Effective date. — This Code section became effective July 1, 2014. See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 195, § 3/HB 749, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all offenses committed on or after such date. The enactment of Code Sections 16-8-22 and 16-8-23 shall not affect any prosecutions for acts occurring before the effective date of Code Sections 16-8-22 and 16-8-23 and shall not act as an abatement of any such prosecutions."

ARTICLE 2

ROBBERY

16-8-40. Robbery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ROBBERY BY FORCE
INCLUDED OFFENSES
ROBBERY BY SNATCHING
JURY INSTRUCTIONS

General Consideration

Aggravated assault conviction merged with robbery conviction where, etc.

Defendants' robbery and aggravated assault convictions, under O.C.G.A. §§ 16-5-21 and 16-8-40, merged because, while aggravated assault did not require taking property from another, aggravated assault was proved by the same or less than all facts required to show robbery, as the assault forming the basis of the aggravated assault with intent to rob, which was pointing a pistol at the victim, was "contained within" the element of robbery requiring the defendants to have used force, intimidation, threat or coercion, or placed the victim in fear of immediate serious bodily injury. Washington v. State, 310 Ga. App. 775, 714 S.E.2d 364 (2011).

Evidence sufficient for conviction.

Evidence was sufficient to support the defendant's conviction for conspiracy to commit armed robbery because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Evidence was sufficient to support the defendant's convictions for felony murder and armed robbery. One witness testified that the witness saw the defendant and the defendant's accomplice chasing the victim just prior to the shooting, while other witnesses testified that the witnesses saw the defendant and the defendant's accomplice fleeing the scene. Milford v. State, 291 Ga. 347, 729 S.E.2d 352 (2012).

Evidence that the defendant and an accomplice entered a store, and the defendant approached two women, pulled out a gun, forced the women and children to the back of the store, and forced them to lie on the floor while the defendant and the accomplice forced an employee to give them money was sufficient to support defendant's robbery and false imprisonment convictions. Taylor v. State, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Evidence that the defendant's wallet was found on the victim's kitchen table, a plastic grocery bag containing the defendant's blood stained clothes were discovered, and DNA testing showed that the blood on the defendant's windbreaker

General Consideration (Cont'd)

came from the victim and the blood spatter was consistent with the wearer having struck the victim, was sufficient to support the defendant's convictions for malice murder and robbery. Hall v. State, 292 Ga. 701, 743 S.E.2d 6 (2013).

Victim's testimony alone, including the victim's identification of the defendant as the perpetrator, was sufficient to establish the essential elements of robbery. Thomas v. State, 322 Ga. App. 734, 746 S.E.2d 216 (2013).

Bank teller's testimony, including the bank teller's identification of the defendant as the robber and the bank teller's description of being very scared, was sufficient, standing alone, to support the defendant's robbery conviction. Coleman v. State, 325 Ga. App. 700, 753 S.E.2d 449 (2014).

Evidence was sufficient to support the defendant's convictions for robbery and aggravated assault because the defendant was advised that the mattresses that the defendant was loading into the defendant's truck belonged to the victim; and when the victim attempted to remove the mattresses from the defendant's truck, the defendant attacked the victim, punching the victim in the face, pushing the victim to the ground, and punching the victim in the chest. Aldridge v. State, 325 Ga. App. 774, 755 S.E.2d 19 (2014).

Sentencing appropriate.

State did not have the right to appeal sentences imposed by the trial court contrary to a plea agreement under O.C.G.A. § 5-7-1(a)(6) because the 15-year sentences, with five years to serve and the remainder on probation, were not void; they were within the 20-year range of punishments for robbery and aggravated assault, O.C.G.A. §§ 16-5-21(b) & 16-8-40(b). State v. Harper, 279 Ga. App. 620, 631 S.E.2d 820 (2006) was overruled. State v. King, 325 Ga. App. 445, 750 S.E.2d 756 (2013).

Appellant failed to show that the sentence imposed for robbery was void because the appellant's 20-year sentence fell within the statutory range of punishment for armed robbery under O.C.G.A. § 16-8-40(b). Williams v. State, 331 Ga. App. 46, 769 S.E.2d 760 (2015).

Sentencing inappropriate. — Lower court erred in sentencing the defendant to 20 years to serve on the criminal attempt to commit robbery count because the maximum sentence the defendant could have received was 10 years as convicted of the offense of criminal attempt to commit a felony, not punishable by death or life imprisonment, could be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which the defendant could have been sentenced if the defendant had been convicted of the crime attempted; the maximum sentence for robbery was 20 years; and half that time was 10 years. Ranger v. State, 330 Ga. App. 578, 768 S.E.2d 768 (2015).

Supervised release properly revoked as robbery was violation of condition of supervised release. — Inmate's supervised release was properly revoked and a sentence of imprisonment imposed because there was sufficient evidence to establish that the inmate committed a violation of a condition thereof by committing robbery and aggravated battery in Georgia. United States v. Hart, 2014 U.S. App. LEXIS 744 (11th Cir. Jan. 15, 2014) (Unpublished).

Cited in Crowley v. State, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Robbery by Force

Indictment insufficient to allege robbery by force. — Indictment for robbery by force, O.C.G.A. § 16-8-40(a)(1), was defective because the indictment failed to allege the essential element that the defendant took the "property of another," defined in O.C.G.A. § 16-8-1(3), and the defendant could admit all the allegations in the indictment and not be guilty of a crime. Defendant's general demurrer should have been granted. Cooks v. State, 325 Ga. App. 426, 750 S.E.2d 765 (2013).

Evidence sufficient to support conviction.

Pursuant to O.C.G.A. § 16-2-20, because the defendant was not only present when a robbery was committed, but also actively aided and abetted the robbery's commission and received a portion of the

money taken from the victim, the evidence was sufficient to find the defendant guilty of robbery by force beyond a reasonable doubt under O.C.G.A. § 16-8-40(a)(1). Brown v. State, 314 Ga. App. 375, 724 S.E.2d 410 (2012).

Sufficient evidence supported a defendant's convictions of robbery under O.C.G.A. § 16-8-40 and simple battery under O.C.G.A. § 16-5-23 when: (1) the defendant grabbed the victim by the throat, put the victim against a wall, and threw the victim onto a table; (2) the victim got a knife; (3) the defendant ran, taking the victim's gaming system and marijuana; and (4) the defendant's claim that the state's main witnesses were not credible was rejected as credibility was a jury matter. Slan v. State, 316 Ga. App. 843, 730 S.E.2d 565 (2012).

Evidence that the defendant and two others pulled the victim over, took the victim's vehicle and gun, grabbed the victim from behind and struck the victim, and took both the victim's vehicle and gun supported the defendant's convictions for robbery and theft by taking. Chambers v. State, 327 Ga. App. 663, 760 S.E.2d 664 (2014).

Included Offenses

Consolidation of indictments proper. — Trial court properly consolidated the indictments charging the defendant with armed robbery, criminal attempt to commit armed robbery, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property because joinder was not prejudicial or erroneous since evidence of the various, intertwined crimes would have been admissible against the defendant had the indictments been tried separately; the trial court was authorized to find that the events in the indictments committed within a two-day period and involving guns and a car constituted a series of connected acts, and the connection between the robberies and the assaults helped identify defendant. Jackson v. State, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

No merger of robbery by intimidation and kidnapping.

Because a defendant forced the victim to drive to an abandoned house and then drove the victim through other neighborhoods before forcing the victim out of the car and refusing to return the victim's personal belongings, the defendant's convictions for kidnapping and robbery by intimidation under O.C.G.A. §§ 16-5-40(a) and 16-8-40 did not merge; pursuant to O.C.G.A. § 17-2-2(e), venue was proper in any county through which the vehicle traveled. Aldridge v. State, 310 Ga. App. 502, 713 S.E.2d 682 (2011).

Merger of multiple counts of robbery. — Defendant's actions in taking the victim's cash and check card occurred simulationously and, thus, those counts should have merged but the taking of the car keys occurred at a separate time and thus did not merge. Andrews v. State, 328 Ga. App. 344, 764 S.E.2d 553 (2014).

Robbery by Snatching

Robbery by snatching where victim aware of theft.

Evidence was sufficient to show that a wallet was taken from the victim's "immediate presence" and that the victim was conscious of the robbery as the robbery occurred since the victim saw the defendant take the wallet from a cart only six feet away; the victim of a robbery by sudden snatching need not become aware of the taking prior to the taking, and it is sufficient if the evidence shows that the victim became aware of the taking as the crime was being committed. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Evidence sufficient for conviction of robbery by snatching.

Evidence that a perpetrator grabbed money from the open cash registers in two establishments in the presence of employees and limited evidence, permitted a jury to conclude that the defendant was the perpetrator, including the law-enforcement officer's testimony as well as the jury's ability to reach that same conclusion after viewing the surveillance videos was sufficient to support a conviction for robbery by sudden snatching. Owens v.

Robbery by Snatching (Cont'd)

State, 317 Ga. App. 821, 733 S.E.2d 16 (2012).

Jury Instructions

Lesser-included offense charges not given where not supported by evidence.

Trial court did not err in refusing to give an instruction on theft by taking as a lesser included offense of robbery by sudden snatching as the victim's testimony was sufficient to support the charge of robbery by snatching and the defense was that another individual committed the crime. Copeland v. State, 325 Ga. App. 668, 754 S.E.2d 636 (2014).

Charge on theft by taking not authorized.

Evidence did not support a charge on theft by taking, O.C.G.A. § 16-8-2, as a lesser included offense of robbery by sudden snatching, O.C.G.A. § 16-8-40(a)(3), because the evidence showed that the victim was conscious of the crime as the crime was being committed; even if the victim did not actually see the defendant pick up the wallet, when the victim saw the defendant running toward the exit of a store with the wallet the victim gave chase but was unable to stop the defendant. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Trial court did not err in refusing to instruct the jury on the lesser offense of theft by taking as the evidence showed that the codefendant admitted taking the victim's wallet and removing money without permission and that the victim resisted and was injured during the altercation, and the defendant admitted the defendant was concerned in the commission of the robbery, making the defendant a party to the crime. Bellamy v. State, 324 Ga. App. 319, 750 S.E.2d 395 (2013).

16-8-41. Armed robbery; robbery by intimidation; taking controlled substance from pharmacy in course of committing offense.

JUDICIAL DECISIONS

Analysis

General Consideration
Jury Charge
Sentence
Use of Weapon
Robbery by Intimidation
Included Offenses
Application

General Consideration

Proof of venue.

Evidence that an armed robbery occurred very near, within sight distance, of the intersection of two roads, and an officer's testimony that the officer was familiar with the area and that the intersection of the two roads was in DeKalb County was sufficient to prove venue beyond a reasonable doubt in DeKalb County. Alexis v. State, 313 Ga. App. 283, 721 S.E.2d 205 (2011).

Relationship to other laws. — Defendant's prior conviction for attempted armed robbery pursuant to an Alford plea qualified as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924, because the record showed that the defendant's plea was knowing and voluntary, and supported by a factual basis. United States v. Wade, 2014 U.S. App. LEXIS 302 (11th Cir. Jan. 8, 2014) (Unpublished).

Immediate presence sufficient.

Evidence sufficiently established that the defendant took property from the person and immediate presence of the victim because the evidence established that the victim was being held at gunpoint in the

kitchen while the defendant stole items from various rooms in the house. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge it, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Gravamen of the offense of armed robbery is the taking of items from the possession of another by use of an offensive weapon and not the identification of the specific owner of the item taken; it does not matter exactly whose property was taken so long as it was taken from a person or the immediate presence of another. Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013).

Extrinsic evidence held harmless. — Defendant's conviction for armed robbery and aggravated assault was affirmed because given the overwhelming evidence, it was highly unlikely that the admission of the testimony concerning the subsequent burglary contributed to the verdict in this case, even if it was erroneous to allow such evidence. Hutchinson v. State, 318 Ga. App. 627, 733 S.E.2d 517 (2012).

Defendant arrested and indicted within statute of limitation. — Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the defendant failed to show that the defense was prejudiced by the six year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c), and the mere existence of the possibility that the latent prints could have established "the real perpetrator" if the prints had matched the prints of another offender in the government's database did not establish actual prejudice. Billingslea v. State, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Evidence of plea not relevant or admissible. — Because the reasoning behind the robbery by intimidation plea between the defendant and the DeKalb County prosecutor did not appear on the face of the document itself, and the defendant would not have been able to testify as to the prosecutor's reasons for accepting the defendant's plea, the evidence regarding the defendant's plea would not have made the defendant's desired inference that the defendant did not use a gun during the Gwinnett County robbery any more probable than it would have been without the evidence; thus, the trial court did not err by refusing to allow the defendant to present evidence of the plea. Johnson v. State, 331 Ga. App. 134, 770 S.E.2d 236 (2015).

Cited in Anthony v. State, 315 Ga. App. 701, 727 S.E.2d 528 (2012); Martinez v. State, 318 Ga. App. 254, 735 S.E.2d 785 (2012); Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); McGlasker v. State, 321 Ga. App. 614, 741 S.E.2d 303 (2013); Jones v. State, 322 Ga. App. 310, 744 S.E.2d 830 (2013); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014); Turner v. State, 331 Ga. App. 78, 769 S.E.2d 785 (2015).

Jury Charge

Requested instruction should have been given. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court should have provided the jury with a requested instruction on mistake of fact pursuant to O.C.G.A. § 16-3-5, as defendant's knowledge of a plan or intent to rob was a

Jury Charge (Cont'd)

material element of the charge and there was evidence that might have supported defendant's version of events. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

Offensive weapon. — Defendant failed to preserve for appellate review the defendant's contention that the trial court erred in using the "offensive weapon" definition of O.C.G.A. § 16-8-41(a) as armed robbery was not one of the charged offenses because the defendant did not object to the charge and expressly declined the trial court's offer to recharge the jury. The charge did not constitute plain error because the definition of "offensive weapon" applicable to armed robbery mirrored very closely the definition of aggravated assault set forth in O.C.G.A. § 16-5-21(a)(2), and an "offensive weapon" under the armed robbery statute necessarily would fall within the category of weapons described in § 16-5-21(a)(2), and therefore the defendant could not show that the instruction affected the outcome of the proceedings. Jackson v. State, 316 Ga. App. 588, 730 S.E.2d 69 (2012).

Instruction held to fully cover all principles of law concerning armed robbery.

In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, there was no error in the trial court's failure to provide the jury with certain instructions requested by defendant, as the charges given either adequately and substantially covered the principles contained in the requested charge, or there was no evidence that supported the requested charge. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Requested instruction not necessary. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court did not err in failing to provide the jury with a requested instruction on hindering the apprehension of a criminal as a lesser included offense pursuant to O.C.G.A. § 16-10-50, as the hindering offense was the equivalent of being an accessory after the fact; moreover, it was not a lesser included offense of the principal crime, but a separate offense. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Pattern jury instruction including witness's degree of certainty in identification. — Defendant's trial counsel was not ineffective for requesting the pattern jury instruction that included a witness's degree of certainty as a factor the jury could consider in assessing the reliability of a witness's identification testimony because the defendant failed to show that the defendant was prejudiced by the request, given the other evidence linking the defendant to the crimes, including the defendant's possession of a victim's cell phone and a revolver matching the description of the one used in all three robberies. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Counsel not ineffective for failing to object to jury charge on armed robbery. — Trial counsel was not ineffective for failing to object to a discrepancy between the armed robberies as alleged in the indictment and the manner in which the jury was charged on the armed robbery offenses because the evidence uniformly showed that the article used in the robbery was a handgun; there was not a reasonable likelihood that the jury convicted the defendant of robbing the victims with a replica, which was mentioned in the trial court's charge to the jury, because each victim referred to the weapon only as a handgun and explicitly referred to the victims' fear of being shot. Green v. State, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

No error in failing to instruct jury on robbery by intimidation. — Jury's

return of not guilty verdicts on all 12 counts of possession of a firearm during the commission of a felony did not demonstrate that, had the jury been instructed on robbery by intimidation, it would have convicted the defendant of that lesser included offense, rather than of armed robbery; thus, the trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Sentence

Sentence as recidivist proper.

Trial court did not err in imposing a sentence of life imprisonment without parole after the defendant was convicted of armed robbery because the record did not support the defendant's assertion that the conviction was obtained in violation of the defendant's constitutional right to counsel; the state offered evidence that the defendant's prior case was tried before a jury, that the defendant exercised the constitutional right to self representation, and that appointed standby counsel was available to assist the defendant at trial. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Sentence appropriate.

Defendant's life sentence for armed robbery was within the statutory limits, O.C.G.A. § 16-8-41(b), and the 20-year sentences imposed for the defendant's aggravated assaults were within the statutory range of punishment under O.C.G.A. § 16-5-21(b). Therefore, the sentences were not void, and the court had no basis for disturbing the sentences. Gillespie v. State, 311 Ga. App. 442, 715 S.E.2d 832 (2011).

Sentence of ten years to serve for felony shoplifting was upheld; contrary to the defendant's contention, the trial court did not sentence the defendant as a recidivist pursuant to O.C.G.A. § 17-10-7. The trial court's imposition of a sentence within the statutory limits would not be disturbed. Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Twenty-year sentence imposed for armed robbery did not violate the United States or Georgia Constitutions as it was within the statutory range for armed robbery and was not grossly disproportionate to the crime. Windhom v. State, 326 Ga. App. 212, 756 S.E.2d 296 (2014).

Merger. — Trial court erred in failing to merge the defendant's conviction for aggravated assault into the defendant's conviction for armed robbery. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Merger of aggravated assault and armed robbery. — Armed robbery counts did not merge into malice murder counts because the evidence was sufficient to show both victims were subjected to the defendant's exercise of actual force by the use of an offensive weapon so as to induce the relinquishment of another's property. Hulett v. State, 296 Ga. 49, 766 S.E.2d 1 (2014).

Because the victim was still being pistol whipped while the men asked the victim what the victim had and took the victim's wallet and cell phone, the robbery by use of a handgun was completed at the same place and approximately the same time as the aggravated assault with a handgun; thus, the timing of the offenses of armed robbery and aggravated assault with intent to rob did not preclude their merger. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Because the "assault" element of aggravated assault with intent to rob is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element, there is no element of aggravated assault with intent to rob that is not contained in armed robbery, and the offenses merge. Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

Use of Weapon

Perception of weapon.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of armed robbery based on the robbery of a Gwinnett County bank by use of a gun, or any replica, article, or device having the appearance of such weapon because the Gwinnett County bank teller testified that the defendant threatened to shoot the

Use of Weapon (Cont'd)

teller, and the defendant's stance, with a hand at the defendant's hip, made the teller believe that the defendant would follow through on that threat; and a bank teller in another county testified that, three days later, the defendant's gestures, including patting a hip, made that teller believe that the defendant had a gun when the defendant robbed that bank. Johnson v. State, 331 Ga. App. 134, 770 S.E.2d 236 (2015).

Supplying weapon for use.

Evidence was sufficient to support defendant's conviction for armed robbery, in violation of O.C.G.A. § 16-8-41, when the defendant planned the robbery, drove the robbers to the scene, supplied the weapon, functioned as a lookout, drove the getaway vehicle, and inquired about the proceeds of the crime. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

Robbery by Intimidation

Evidence sufficient for conviction.

Sufficient evidence supported the defendant's conviction for armed robbery because despite the defendant's trial testimony claiming a friend took the defendant to pick up pizza while the robbery was in progress, it was for the jury to determine the credibility of the witnesses, and the jury was authorized to disbelieve the alibi defense the defendant proffered. Gordon v. State, 329 Ga. App. 2, 763 S.E.2d 357 (2014).

Included Offenses

Failure to charge on robbery by intimidation.

Trial court did not commit plain error in failing to charge the jury on robbery by intimidation as a lesser-included offense of armed robbery because the defendant denied committing any offense; and the evidence relied upon by the defendant did not show robbery by intimidation as there was no evidence that a robbery was committed without the use of a gun. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

No merger with aggravated assault.

Defendant's convictions for armed robbery and aggravated assault did not merge because each crime required proof of conduct that the other did not; the armed robbery as charged in the indictment required proof of an intent to rob and that the victim's wallet was taken, while the aggravated assaults required proof that the victim's neck was slashed with a sharp weapon. Thomas v. State, 310 Ga. App. 404, 714 S.E.2d 37 (2011).

Trial court was correct not to merge the defendant's convictions for armed robbery and aggravated assault because although the defendant's conviction for the armed robbery of the victim resulted from a holdup, the conviction for aggravated assault was based on the defendant's forcing the shotgun down the victim's throat later in a bathroom. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court did not err when the court refused to merge the defendant's aggravated assault and armed robbery convictions because the armed robbery and aggravated assault were separate and distinct acts; the victim's testimony showed that the armed robbery was complete before the commission of the aggravated assault. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Merger with aggravated assault.

Trial court's failure to merge the defendant's aggravated assault conviction with the defendant's armed robbery conviction in imposing the sentence was erroneous because there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery; both crimes required proof of an intent to rob because the elements of the defendant's armed robbery charge under O.C.G.A. § 16-8-41(a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another, and the elements of the defendant's aggravated assault charge under O.C.G.A. § 16-5-21(a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Because the defendant's convictions for armed robbery and aggravated assault arose from the same act or transaction, the defendant's taking money from the victim at gunpoint, the defendant's aggra-

vated assault conviction against that victim merged with the armed robbery conviction. Thomas v. State, 289 Ga. 877, 717 S.E.2d 187 (2011).

Trial court erred by failing to merge an aggravated assault charge into an armed robbery charge because the victim testified repeatedly that the defendant was in the victim's apartment when the defendant shot the victim and that the victim fired a gun as soon as the victim saw the defendant point a gun at the victim while forcing the defendant's way in; both crimes were complete when the defendant pointed the gun at the victim while simultaneously entering the apartment, and there was no separate aggravated assault before the armed robbery began. Davis v. State, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial court erred in failing to merge the defendant's conviction for aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), into the defendant's conviction for armed robbery conviction, O.C.G.A. § 16-8-41(a), because the act of using an offensive weapon for the purposes of committing an armed robbery was the legal equivalent of assault for the purposes of committing an aggravated assault; it is not determinative under the merger analysis that the desired object of a defendant's armed robbery was something other than that which he or she actually took, but instead, what dictates merger is the fact that both crimes for which the defendant was convicted were predicated upon the same conduct. Hall v. State, 313 Ga. App. 66, 720 S.E.2d 181 (2011).

Trial court erred by failing to merge the defendant's convictions for aggravated assault with a deadly or offensive weapon and armed robbery convictions for sentencing purposes because hitting a victim in the head with a handgun while demanding money were not separate and distinct acts but one uninterrupted criminal transaction. Haynes v. State, 322 Ga. App. 57, 743 S.E.2d 617 (2013).

Merger with aggravated assult with intent to rob.

Trial court erred in not merging a defendant's aggravated assault with attempt to rob conviction, O.C.G.A. § 16-8-21(a), into the defendant's armed robbery conviction, O.C.G.A. § 16-8-41. The offense of armed robbery contained a requirement, the taking of property, that aggravated assault did not, but aggravated assault with intent to rob did not require proof of a fact which armed robbery did not. Daniels v. State, 310 Ga. App. 541, 713 S.E.2d 689 (2011).

No merger with murder count.

Defendant's conviction for armed robbery was properly not merged into a malice murder conviction pursuant to O.C.G.A. § 16-1-7(a)(1), based on the "required evidence" test, as each offense required proof of an element that the other did not. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Application

Force or intimidation essential to robbery, etc.

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault, armed robbery, and attempted armed robbery because during the confrontation, the defendant stated to one of the victims that the defendant had shot a person the day before; shooting the victims when the defendants was frustrated in the robbery attempts was consistent with the defendant's behavior toward the other victims. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Identification of defendant.

Trial court did not err in denying the defendant's motion to exclude the in-court identification by each of the armed robbery victims because each of the victims' identification of the defendant had an independent origin; each of the victims observed the defendant face to face in full daylight and identified the defendant's photograph within days of being robbed, and the first victim identified the defendant as the victim drove by in a car. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery in violation of O.C.G.A. § 16-8-41(a) of the victim, a restaurant employee, who was pressure washing the exterior of the restaurant in a

Application (Cont'd)

lit parking lot. The employee testified that the employee observed the defendant's face the entire time that the defendant held a gun to the employee's chest. Battise v. State, 309 Ga. App. 835, 711 S.E.2d 390 (2011).

Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Victim's testimony that the defendant was one of the two men who came into the victim's house, beat the victim with fists and a flashlight, and demanded the victim's keys and money authorized the jury to find the defendant guilty of burglary, aggravated battery, and criminal attempt to commit armed robbery. Garmon v. State, 317 Ga. App. 634, 732 S.E.2d 289 (2012).

Sufficient evidence existed to support the defendant's convictions for armed robbery and aggravated assault based on the victims' testimony that guns were used in the commission of the crimes, the testimony of the defendant's girlfriend, and the presence of a cell phone found near the scene of the crimes, and the victims identifying the defendant's accent was sufficient for the jury to infer that the defendant was an armed participant in the crimes. Jordan v. State, 320 Ga. App. 265, 739 S.E.2d 743 (2013).

Sufficient evidence supported the defendant's convictions for two counts of armed robbery with respect to two victims at the first residence, attempt to commit armed robbery with respect to one of the victims at the first residence, and two counts of burglary with respect to the two residences because the accomplice testimony was sufficiently corroborated by one of the witnesses, who identified the defendant. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

With regard to the defendant's convictions for armed robbery, aggravated assault, burglary, and false imprisonment, the trial court did not err by denying the motion to suppress the out-of-court identifications of the defendant because the court found that the simultaneous lineup was not impermissibly suggestive as a matter of law based on the testimony of the officer who prepared and presented the lineup that the victims were admonished that the suspect may not be in the array. McCowan v. State, 325 Ga. App. 509, 753 S.E.2d 775 (2014).

Sufficient evidence supported the defendant's conviction for armed robbery based on the testimony of the employee, who identified the defendant and the codefendants, and a surveillance video, which showed them in the same clothing witnesses had seen them wearing; plus, the defendant's cell phone records placed the defendant in the area of the robbery at the time the robbery occurred, despite defendant claiming to be in another city at the time. Carter v. State, 326 Ga. App. 144, 756 S.E.2d 232 (2014).

Jury was authorized to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony based on the witnesses' positive identification of the defendant's distinctive speech; the ski mask and salad bag found in the defendant's vehicle from the restaurant robbed; and the sudden, labored, and sweaty appearance of the defendant immediately after the robbery and high speed chase. Walker v. State, 329 Ga. App. 369, 765 S.E.2d 599 (2014).

Value of property taken is irrelevant to offense of armed robbery.

Evidence was sufficient to convict the defendant of armed robbery because the defendant's testimony affirmed that the front-seat passenger pulled a gun on the victim, but never addressed whether or not money was taken; O.C.G.A. § 16-8-41(a) presents no requirement of proof of value. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Accomplice testimony sufficiently corroborated in robbery trial. — Trial court did not err by denying the defendant's motion for a new trial based on the defendant's contention that the evidence

was insufficient to corroborate the accomplice testimony implicating the defendant in the robbery because the testimony of the victim identified the defendant as the perpetrator and was sufficient corroboration of the accomplice's testimony. Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013).

No variance as to weapon.

There was no fatal variance between the indictment that alleged that the defendant committed armed robbery by use of a pellet pistol and evidence that showed that the weapon used was a BB gun. Jones v. State, 312 Ga. App. 15, 717 S.E.2d 526 (2011).

Severance not required.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever armed robbery offenses because the three robberies took place in a limited geographical area within four weeks of each other, each involved a man approaching a lone pedestrian during the daytime, pointing a revolver at the victim, and demanding that the victim throw the victim's money and property on the ground, and then fleeing on foot; the modus operandi of the robberies was strikingly similar, allowing the trial court the discretion to deny the motion to sever, and the evidence was far from complex and posed no significant risk of jury confusion. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Circumstantial evidence sufficient.

Circumstantial evidence that a defendant was found walking not far from the scene of a robbery, with money in similar denominations to that which was stolen, clothing (including ski gloves) as described by the victim, and a gun, was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a). Rankin v. State, 309 Ga. App. 817, 711 S.E.2d 377 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106 because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Sufficient circumstantial evidence supported the defendant's armed robbery conviction because the evidence showed the defendant actively aided and abetted the defendant's codefendant by: (1) driving the codefendant to a crime scene; (2) waiting during the crimes with an intent to use the defendant's car as a getaway car; (3) fleeing the scene with the codefendant; (4) waiting while the codefendant broke into a house; (5) fleeing the house with the codefendant; and (6) having a gunshot wound. Jones v. State, 315 Ga. App. 427, 727 S.E.2d 216 (2012).

Evidence was sufficient to support convictions for armed robbery and possession of a firearm during the commission of a crime, as the state presented the requisite corroboration to the codefendant's testimony; the getaway driver's testimony about the height of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Merger with other convictions.

Defendant's conviction for aggravated assault merged into the defendant's conviction for attempted armed robbery because the relevant aggravated assault provision did not require proof of any fact that was not also required to prove the attempted armed robbery as that offense could have been proved under the indictment in the case. Garland v. State, 311 Ga. App. 7, 714 S.E.2d 707 (2011).

Merged counts for sentencing.

Defendant's convictions for armed robbery and aggravated assault should have been merged for sentencing, as a codefendants' actions, which occurred either concurrently or in rapid succession, were committed as part of one uninterrupted

Application (Cont'd)

criminal transaction and in pursuit of a specific, predetermined goal: the armed robbery of a single victim. Crowley v. State, 315 Ga. App. 755, 728 S.E.2d 282 (2012).

Merger with aggravated assault. — Conviction for aggravated assault should have been merged with the defendant's conviction for armed robbery because the convictions both required proof of the same elements. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

Circumstantial evidence held sufficient for conviction.

Sufficient evidence supported defendant's convictions for armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm because the evidence showed that the defendant was identified by the victim, the defendant was arrested about an hour and a half after the crimes occurred in the Lincoln Town car used during the commission of the crimes, which the defendant admitted belonged to the defendant, and the cell phone that the victim had reported stolen was found in the car in addition to guns matching the victim's description of the weapons used. Hinton v. State, 321 Ga. App. 445, 740 S.E.2d 394 (2013).

There was sufficient evidence to support the defendant's conviction for armed robbery, O.C.G.A. § 16-8-41, based on the state showing that a victim was forcibly detained in a bathroom while various property was taken by the defendant and codefendants, with some being retrieved from the get-away car and it did not matter whose property was taken. Avila v. State, 322 Ga. App. 225, 744 S.E.2d 405 (2013).

Testimony regarding observation of video surveillance recording not hearsay. — Trial court did not abuse the court's discretion in allowing a store manager to testify regarding the manager's observation of the store's video-surveillance-system recording, which showed the defendant just before the defendant entered the store, because the testimony was not hearsay since it did not ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rested on the store manager's own veracity and competence; the store manager did not testify about what another person said or wrote outside of court, but rather, the store manager testified as to the manager's personal observations of the defendant's conduct that appeared on the video-surveillance-system recording. McClain v. State, 311 Ga. App. 750, 716 S.E.2d 829 (2011).

Conspiracy to commit armed robbery sufficient. — Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because the defendant's claim that pursuant to O.C.G.A. § 16-4-9, the defendant renounced and abandoned the conspiracy and that a co-conspirator fatally shot the victims was contradicted by the physical evidence at trial; shell casings from two guns were found at the murder scene and in positions indicating that there were two weapons fired by different individuals. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012).

State did not have to prove the defendant had knowledge of the weapon to be convicted of felony murder, aggravated assault with a deadly weapon, armed robbery, hijacking a motor vehicle, possession of a firearm during a felony, conspiracy to commit armed robbery, and conspiracy to commit hijacking a motor vehicle. The evidence was sufficient to authorize a rational jury to find that the defendant conspired to rob the victims and murder was a reasonably foreseeable consequence of the conspiracy. Hicks v. State, 295 Ga. 268, 759 S.E.2d 509 (2014).

Driver who remained in vehicle convicted of armed robbery. — Evidence that the defendant drove the car and remained there while the defendant's boyfriend took the victim's backpack at gunpoint was sufficient to support the defendant's conviction for armed robbery. Teele v. State, 733 S.E.2d 395, No. A12A1649, 2012 Ga. App. LEXIS 857 (2012).

Evidence sufficient to sustain conviction for armed robbery.

Evidence was sufficient for the jury to

find the defendant guilty beyond a reasonable doubt of using a handgun to rob each of the victims because on three separate occasions within a three week period, the defendant used a revolver to rob a solitary pedestrian during daylight hours, all in the same part of the city, and at trial, each of the victims identified the defendant as the person who robbed them; after arresting the defendant, officers inventoried the contents of the defendant's vehicle and found a loaded .38 caliber revolver and a cell phone, and an officer determined that the cell phone belonged to the third victim. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Evidence was sufficient to convict a defendant of armed robbery based on the victim's testimony that the defendant and the defendant's codefendant approached the victim, asked for cigarettes, pulled a gun on the victim and stuck a gun in the victim's stomach, then relieved the victim of the victim's cigarettes and the victim's wallet with $300 that the victim had just been paid. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery after a convenience store clerk was robbed at gunpoint by a perpetrator who was wearing a nylon stocking over the perpetrator's head because: (1) the clerk recognized the defendant as the perpetrator by the defendant's voice and physical build when the defendant returned to the store three days later as a customer; (2) the clerk later identified defendant as the perpetrator in a picture lineup; and (3) the state presented the testimony of an expert polygraph examiner, who stated that defendant showed deception to questions concerning the armed robbery. Jones v. State, 309 Ga. App. 886, 714 S.E.2d 590 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801 et seq.). Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, felony murder while in the commission of armed robbery, armed robbery, and conspiracy to violate the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq., through a violation of O.C.G.A. § 16-13-30(j)(1), because: (1) the defendant and another buyer met with the victim and another seller where the defendant and the other buyer inspected marijuana which the victim and the other seller had for sale; (2) after some discussion about price, the victim told the defendant what the price was and that the defendant could take it or leave it; (3) the defendant said that the defendant would take it, pulled a gun from the defendant's waistband, and fatally shot the victim; and (4) there was conflicting testimony as to whether the defendant took the marijuana and ran away with the marijuana after shooting the victim. Darville v. State, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant's convictions for armed robbery, aggravated assault, and malice murder were based on sufficient evidence when a victim in an apartment next to the defendant's was fatally stabbed multiple times, there was physical evidence that tied the defendant to the criminal incident, and the defendant confessed to committing the crimes. Culpepper v. State, 289 Ga. 736, 715 S.E.2d 155 (2011).

Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Evidence was sufficient to support the defendant's conviction for armed robbery, under O.C.G.A. § 16-8-41(a), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant

Application (Cont'd)

with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the defendant, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the defendant wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Evidence that a defendant concealed a designer handbag and four wallets under a shopping bag and started to leave a department store, and that the defendant then, seeing a security guard had been alerted, concealed the items under a clothing rack, was sufficient to convict the defendant of felony shoplifting in violation of O.C.G.A. § 16-8-14(a)(1). Tyner v. State, 313 Ga. App. 557, 722 S.E.2d 177 (2012).

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Evidence was sufficient to support the defendant's conviction for armed robbery because the phone and cash register taken from the immediate presence of the victim was the property of another in that the property belonged to the phone business of the victim's family. Jackson v. State, 314 Ga. App. 806, 726 S.E.2d 63 (2012).

Sufficient evidence showed the defendant committed armed robbery, under O.C.G.A. § 16-8-41(a), because the defendant accompanied a codefendant to a crime scene, acted as a lookout, and shared in the proceeds. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to support the defendant's conviction for armed robbery because an accomplice testified to committing a series of armed robberies and that the defendant had participated by selecting the stores to rob, supplying the gun, acting as the getaway driver, and receiving part of the stolen money; law enforcement officers testified that the accomplice implicated the defendant during an interrogation, and officers found items of clothing matching those worn by the armed robber in the defendant's hotel room. Wil-

liams v. State, 314 Ga. App. 840, 726 S.E.2d 66 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of them of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-44.1, 16-8-41(a), 16-11-106. Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Evidence was sufficient to sustain convictions for armed robbery and possession of a firearm during the commission of a felony when the evidence showed that the defendant either directly committed or was a party to the armed robberies of both victims at a rest area. A custodian present at the scene identified the defendant as one of the perpetrators who had participated in the crimes, and the defendant's flight from the rest area, flight from the officers, act of driving the getaway car, and possession of one victim's driver's license and clothing items linked the defendant to the crimes. Bryson v. State, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Sufficient evidence supported the defendant's armed robbery conviction, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Evidence was sufficient to support the count of armed robbery of the victim whose purse and money were returned, as the purse was forcibly taken, by use of a gun, while the victim was immobilized, and complete dominion of the property was transferred from the victim to the robbers, which was sufficient asportation to meet the statutory criteria. Holder v. State, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Evidence was sufficient to support the defendant's convictions for armed robbery and aggravated assault when, in addition to accomplice testimony implicating the defendant, the descriptions of the defendant's clothing at the time of offenses offered by the accomplice and one of the victims were the same, and the driver of the vehicle the defendant left the area in testified that on the day of the robbery, the driver drove the defendant and the accomplice to an area near the location of the offenses, left the car and upon the driver's return the defendant and the accomplice were gone, another passenger told the driver to meet the defendant and the accomplice at a gas station across from the scene of the offenses, and the defendant and the accomplice returned to the car at the gas station with a box full of change. Love v. State, 318 Ga. App. 387, 734 S.E.2d 95 (2012).

State's physical evidence, including the victim's blood on the defendant's shirt, the defendant's unexplained possession of the victim's truck, watch, and other personal property, and the fact that the defendant was seen near the victim's residence and farm not long before the crimes were committed, supported the defendant's convictions for malice murder and armed robbery. Blevins v. State, 291 Ga. 814, 733 S.E.2d 744 (2012).

Evidence that the defendant owned a firearm, gunshots were heard in the area of the shooting, the fatal attack occurred after a drug deal which the defendant was brokering for the victim went bad, the victim obtained a large sum of money to accomplish the drug buy, and the defendant or one of the defendant's cohorts was seen retrieving a bag of money. Brown v. State, 291 Ga. 892, 734 S.E.2d 23 (2012).

Testimony of the female victim and the accomplice that the defendant held a pistol on both victims and demanded and took cash from the male victim, along with the DNA evidence on the floor at the scene of the rape, was sufficient for the jury to find that the defendant was guilty of kidnapping with bodily injury (by rape) and rape against a female victim, and kidnapping and armed robbery against a male victim. Brinkley v. State, 320 Ga. App. 275, 739 S.E.2d 703 (2013).

Sufficient evidence existed to support the defendant's convictions for aiding and

Application (Cont'd)

abetting armed robbery, burglary, aggravated assault, and false imprisonment based on the evidence that the defendant was a party to the crimes, including evidence that the defendant drove the codefendants to the house just before the crimes were committed; that the defendant was in the vehicle when plans to commit the crimes were discussed; that the defendant waited in the victim's driveway when the codefendants entered the front door of the house, wearing masks and carrying guns; and that the defendant drove the perpetrators away from the scene after the crimes were committed—speeding, driving erratically, and not stopping when the police, with sirens and lights activated, began following the vehicle. Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

Defendant's convictions for armed robbery and aggravated assault were supported by sufficient evidence in that, even absent fingerprint evidence, there was the identifications of two eyewitnesses as well as a bottle bearing the store's logo and the amount of cash and same denomination reported stolen found on the defendant's person. Hamlin v. State, 320 Ga. App. 29, 739 S.E.2d 46 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Testimony of an accomplice that the defendant was with the others during the robbery of the first victim and ran off and ate pizza with everyone afterward and the testimony of the second victim identifying the defendant at trial as the man the second victim spoke to about selling a Blackberry while an accomplice put a gun to the second victim's neck, searched the second victim's pockets, and took the second victim's Blackberry and wallet, was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Fuller v. State, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

Evidence that the victims were robbed by individuals driving a Honda Civic who were armed with a gun; that the defendant admitted to distracting the victims while the other participants robbed the victims; that the defendant was wearing a plaid shirt when arrested, like the first victim testified one assailant was wearing; that the defendant and the other participants ran from the Civic shortly after an officer attempted to stop the car for driving without headlights; and that the first victim's purse and the second victim's checkbook were found in the Civic, from which the defendant was seen exiting and fleeing was sufficient to support the defendant's conviction for armed robbery. Lindsey v. State, 321 Ga. App. 808, 743 S.E.2d 481 (2013).

Evidence that the defendant and an accomplice were both tied to robberies just before and just after the robberies of the second and third victims, an officer observed the defendant and the accomplices exit a car registered to the defendant's mother shortly after the robberies, and items stolen from the second and third victims were found in that car, was sufficient to support the defendant's convictions for the second and third robberies. Wickerson v. State, 321 Ga. App. 844, 743 S.E.2d 509 (2013).

Evidence that the defendant was found in the laundry room of the home that was

the subject of the home invasion; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence that the victim identified the defendant as the robber with a gun and to whom the victim was forced to give money and a recording from a device the victim wore where a male was saying to get out of the car before he shot someone in the face was sufficient to support the defendant's conviction for armed robbery. Biggins v. State, 322 Ga. App. 286, 744 S.E.2d 811 (2013).

Evidence that the defendant took money from the second victim while holding scissors, without evidence that the second victim owed the defendant money, supported the armed robbery conviction. Bradley v. State, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

Evidence the defendant took a purse and a car from a woman after telling the woman to drive or die while pointing a sock covered rock at the woman supported the defendant's conviction for armed robbery. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defendant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest the defendant. Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

Evidence the defendant entered the gift shop wielding a meat cleaver, made repeated demands for money, and the two victims were present and held in fear when the money was taken from the cash register and a video poker machine was sufficient to support the defendant's robbery convictions as to those two victims. Bradford v. State, 327 Ga. App. 621, 760 S.E.2d 630 (2014).

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the evidence showing that the defendant was found by police hiding after a high speed chase, was in a car with two men who fit the description of the two men who robbed the restaurant, and the car contained a deposit slip identified by a restaurant worker. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

Evidence was sufficient to convict the defendant of armed robbery and burglary because three black males robbed the store, one of whom pointed a gun at the store manager; after the defendant was apprehended, the defendant made incriminating statements that the defendant took the stuff to pay bills and that the defendant did not know where the other two individuals were; and the bags found in the defendant's vicinity consisted of six cooler totes containing approximately $700 in merchandise from the store and a plastic bag containing money and the deposit slip from the store's safe. Brooks v. State, 324 Ga. App. 352, 750 S.E.2d 423 (2013).

Evidence was sufficient to convict the defendant of armed robbery because the state presented evidence that the defendant used force against the victim before taking the victim's money as the theft was completed after the defendant stabbed the victim to death with a knife. Bates v. State, 293 Ga. 855, 750 S.E.2d 323 (2013).

Evidence that the defendant took a laptop during the burglary, including a codefendant's statement that the codefendant saw the defendant emerge from the victim's home with the laptop under the defendant's arm, and the fact that the defendant appeared with a camcorder taken from the victim the day after the

Application (Cont'd)

murder and the gun used in the murder was found in defendant's home was sufficient to support an armed robbery conviction. Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013).

Sufficient evidence supported the defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed the defendant to be charged with and convicted of the same offenses as the codefendant since the evidence showed that the defendant drove the codefendant to the fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony because, although the two passengers of the car committed the actual armed robbery, there was evidence that the defendant, the driver of the car, knew that the two passengers were armed and that the defendant "kind of sort of" knew what they were going to do, which supported a finding that the defendant participated in the robbery as the getaway driver. Smith v. State, 325 Ga. App. 745, 754 S.E.2d 788 (2014).

Evidence was sufficient to convict the defendant of the four armed robberies as a party as the accomplice testified that the robberies were executed pursuant to a plan orchestrated and aided by the defendant; the accomplice never pointed the weapon at the defendant, nor demanded the defendant's property; and, although the defendant had successfully fled the property, the defendant circled back to the residence — while the accomplice was still there — and attempted to steal electronic equipment. Styles v. State, 329 Ga. App. 143, 764 S.E.2d 166 (2014).

Evidence was sufficient to convict the defendant of armed robbery because the victim arranged to purchase a car from the defendant for $4000; the victim met the defendant and got into the defendant's car to go see the car for sale; when the defendant pulled into a driveway and unlocked the car doors, eight or nine masked people dressed in black with handguns and shotguns grabbed the victim, pulled the victim out the car, beat the victim, and then robbed the victim of the $4000 cash the victim had to purchase the car, another $300 in cash the victim had, the victim's cell phone, and the victim's flip-flops; and the defendant told one of the men holding a gun to the victim's head not to shoot the victim. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Evidence was sufficient to support defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defandant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Victim's testimony that the defendant pointed a gun at the victim, gave the gun to an accomplice, and took the victim's possessions, and that the victim was 100% sure the defendant was one of the robbers was sufficient to support a conviction for armed robbery. Hogan v. State, 330 Ga. App. 596, 768 S.E.2d 779 (2015).

Evidence sufficient to support conviction of criminal attempt to commit armed robbery.

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was sufficient to support the defendant's convictions for criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Parties to crime.

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant was a party to the crime of armed robbery, O.C.G.A. § 16-8-41(a), because at trial, the victim identified the defendant as matching the description of one of the men who attacked the victim, and the defendant admitted to being with the codefendant on the night of the offense. Kirkland v. State, 315 Ga. App. 143, 726 S.E.2d 644 (2012).

Evidence that the defendant drove to the robbery scene, supplied the weapon, functioned as the lookout, and drove the getaway vehicle was sufficient to show that the defendant was a party to an armed robbery. Windhom v. State, 326 Ga. App. 212, 756 S.E.2d 296 (2014).

Corroborating accomplice testimony sufficient to support conviction.

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) and for the jury to find beyond a reasonable doubt that the defendant committed armed robbery, O.C.G.A. § 16-8-41(a), hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and kidnapping, O.C.G.A. § 16-5-40(a); the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the co-conspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011).

Evidence insufficient to support an armed robbery charge, etc.

Evidence was insufficient to support a conviction for armed robbery as to the third victim as the record lacked any evidence of a taking of property belonging to the third victim or over which the victim exercised some level of control. Bradford v. State, 327 Ga. App. 621, 760 S.E.2d 630 (2014).

Circumstantial evidence sufficient for bank robbery. — Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a) because al-

Application (Cont'd)

though circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Similar transaction evidence properly admitted. — Trial court did not abuse the court's discretion by allowing the state to introduce the evidence of a similar robbery to show the defendant's intent and modus operandi or course of conduct, which were legitimate purposes at the time of trial, because the state presented sufficient evidence that the defendant committed the other robbery, which involved robbing a restaurant night manager at closing time while concealing the defendant's face with clothing. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

Motion for mistrial should have been granted. — In defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, an investigating officer's testimony that, based on defendant's conduct, the victim believed that the robbers and defendant had acted in concert, should not have been admitted; as there was no limiting instruction, and it was the only direct evidence of defendant's participation, the error was not harmless, such that a mistrial should have been granted. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

No ineffective assistance for failure to object to cell phone records. — Although the transcript failed to show that the investigator was qualified as an expert in the meaning of cell phone records, there was direct evidence that the defendant was at the scene of the robbery, thus, the defendant failed to show a reasonable likelihood that, but for counsel's failure to object, the outcome of the trial would have been different. Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014).

Reversible error occurred for failure of trial court to question juror. — Codefendant's conviction for armed robbery was reversed because the trial court abused the court's discretion by refusing to strike a juror for cause since the trial court never questioned the juror and the juror never gave an affirmative response that the juror would be able to follow the court's instructions. Carter v. State, 326 Ga. App. 144, 756 S.E.2d 232 (2014).

RESEARCH REFERENCES

ALR. — Parts of human body, other than feet, as deadly or dangerous weapons or instrumentalities for purposes of statutes aggravating offenses such as assault and robbery, 67 ALR6th 103.

ARTICLE 3

CRIMINAL REPRODUCTION AND SALE OF RECORDED MATERIAL

16-8-60. Reproduction of recorded material; transfer, sale, distribution, circulation; civil forfeiture; restitution.

(a) It is unlawful for any person, firm, partnership, corporation, or association knowingly to:

(1) Transfer or cause to be transferred any sounds or visual images recorded on a phonograph record, disc, wire, tape, videotape, film, or

other article on which sounds or visual images are recorded onto any other phonograph record, disc, wire, tape, videotape, film, or article without the consent of the person who owns the master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which the sounds or visual images are derived; or

(2) Sell; distribute; circulate; offer for sale, distribution, or circulation; possess for the purpose of sale, distribution, or circulation; cause to be sold, distributed, or circulated; cause to be offered for sale, distribution, or circulation; or cause to be possessed for sale, distribution, or circulation any article or device on which sounds or visual images have been transferred, knowing it to have been made without the consent of the person who owns the master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which the sounds or visual images are derived.

(b) It is unlawful for any person, firm, partnership, corporation, or association to sell; distribute; circulate; offer for sale, distribution, or circulation; or possess for the purposes of sale, distribution, or circulation any phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images have been transferred unless such phonograph record, disc, wire, tape, videotape, film, or other article bears the actual name and address of the transferor of the sounds or visual images in a prominent place on its outside face or package.

(c) This Code section shall not apply to any person who transfers or causes to be transferred any such sounds or visual images:

(1) Intended for or in connection with radio or television broadcast transmission or related uses;

(2) For archival purposes; or

(3) Solely for the personal use of the person transferring or causing the transfer and without any profit being derived by the person from the transfer.

(d) Every person convicted of violating this Code section shall be guilty of a felony and shall be punished as follows:

(1) Upon the first conviction of violating this Code section, by a fine of not less than $500.00 nor more than $25,000.00, by imprisonment for not less than one year nor more than two years, or both such fine and imprisonment;

(2) Upon the second conviction of violating this Code section, by a fine of not less than $1,000.00 nor more than $100,000.00, by imprisonment for not less than one year nor more than three years

and the judge may suspend, stay, or probate all but 48 hours of any term of imprisonment, or both such fine and imprisonment; or

(3) Upon the third or subsequent conviction of violating this Code section, by a fine of not less than $2,000.00 nor more than $250,000.00, by imprisonment for not less than two nor more than five years and the judge may suspend, stay, or probate all but six days of any term of imprisonment, or both such fine and imprisonment.

(e) This Code section shall neither enlarge nor diminish the right of parties to enter into a private contract.

(f)(1) Any phonograph record, disc, wire, tape, videotape, film, or other article onto which sounds or visual images have been transferred in violation of this Code section are declared to be contraband and no person shall have a property right in them; provided, however, that notwithstanding paragraph (2) of subsection (a) of Code Section 9-16-17, no property of any owner shall be forfeited under this paragraph, to the extent of the interest of such owner, by reason of an act or omission established by such owner to have been committed or omitted without knowledge or consent of such owner.

(2) Any property subject to forfeiture pursuant to paragraph (1) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(g) For purposes of imposing restitution pursuant to Chapter 14 of Title 17 when a person is convicted pursuant to this Code section, the court shall consider damages to any owner or lawful producer of a master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which sounds or visual images are derived. Restitution shall be based upon the aggregate wholesale value of lawfully manufactured and authorized recorded devices corresponding to the nonconforming recorded devices involved in the violation of this Code section and shall also include reasonable investigative costs related to the detection of the violation of this Code section. (Ga. L. 1975, p. 44, § 1; Ga. L. 1978, p. 1938, § 1; Ga. L. 1986, p. 652, § 1; Ga. L. 1988, p. 13, § 16; Ga. L. 2008, p. 240, § 1/SB 406; Ga. L. 2015, p. 693, § 2-7/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted "in violation of this Code section are declared to be contraband and no person shall have a property right in them; provided, however, that notwithstanding paragraph (2) of subsection (a) of Code Section 9-16-17," for "shall be subject to forfeiture to the State of Georgia except that" near the middle of paragraph (f)(1); and substituted the present provisions of paragraph (f)(2) for the former provisions, which read: "The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for under Code Section 16-13-49." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall

become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

JUDICIAL DECISIONS

Multiple charges. — Because defendant's argument on appeal was a challenge to defendant's convictions for making 91 unauthorized offers to sell recorded material under O.C.G.A. § 16-8-60(b), and because an O.C.G.A. § 16-1-7(a) motion to correct or modify an illegal sentence was not an appropriate remedy to attack a conviction in a criminal case, defendant did not properly challenge the convictions; defendant's only recourse was through habeas corpus proceedings. Rogers v. State, 314 Ga. App. 398, 724 S.E.2d 417 (2012).

ARTICLE 4

MOTOR VEHICLE CHOP SHOPS AND STOLEN AND ALTERED PROPERTY

16-8-83. Owning, operating, or conducting a chop shop; penalty.

JUDICIAL DECISIONS

Verdicts not mutually exclusive. — Although the defendant characterized the jury's verdicts finding the defendant guilty of operating a chop shop and of falsifying a vehicle identification number as mutually exclusive, the two guilty verdicts returned by the jury could be logically reconciled as a finding that a person wilfully removed or falsified the identification number of a vehicle does not logically exclude a finding that the person owned, operated, or conducted a premise in which the person knowingly altered a vehicle identification number with the intent of misrepresenting the vehicle's identity, and the defendant's challenge was actually predicated upon the inconsistent verdict rule, which had been abolished in Georgia. Wilmott v. State, 326 Ga. App. 1, 755 S.E.2d 818 (2014).

16-8-85. Civil forfeiture of personal property seized.

(a) The following are subject to forfeiture unless obtained by theft, fraud, or conspiracy to defraud and the rightful owner is known or can be identified and located:

(1) Any tool;

(2) Any implement; or

(3) Any instrumentality, including, but not limited to, any motor vehicle or motor vehicle part, whether or not owned by the person from whose possession or control it was seized, which is used or possessed either in violation of Code Section 16-8-83 or to promote or facilitate a violation of Code Section 16-8-83.

(b) Any motor vehicle, other conveyance, or motor vehicle part used by any person as a common carrier is subject to forfeiture under this

Code section where the owner or other person in charge of the motor vehicle, other conveyance, or motor vehicle part is a consenting party to a violation of Code Section 16-8-83.

(c) If a motor vehicle part has an apparent value in excess of $1,000.00:

(1) The seizing agency shall consult with an expert of the type specified in paragraph (4) of Code Section 16-8-82; and

(2) The seizing agency shall also request searches of the online and offline files of the National Crime Information Center and the National Automobile Theft Bureau when the Georgia Bureau of Investigation and Georgia Crime Information Center files have been searched with negative results.

(d) Any property subject to forfeiture pursuant to this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9, except as specifically set forth in subsections (g) through (j) of this Code section.

(e) A copy of a forfeiture order shall be filed with the sheriff of the county in which the forfeiture occurs and with each federal or state department or agency with which such property is required to be registered. Such order, when filed, constitutes authority for the issuance to the agency to whom the property is delivered and retained for use or to any purchaser of the property of a certificate of title, registration certificate, or other special certificate as may be required by law in consideration of the condition of the property.

(f) No motor vehicle, either seized under Code Section 16-8-84 or forfeited under this Code section, shall be released by the seizing agency or used or sold by an agency designated by the court unless any altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed vehicle identification number is corrected by the issuance and affixing of either an assigned or replacement vehicle identification number plate as may be appropriate under laws or regulations of this state.

(g) No motor vehicle part having any altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed vehicle identification number may be disposed of upon forfeiture except by destruction thereof, except that this subsection shall not apply to any such motor vehicle part which is assembled with and constitutes part of a motor vehicle.

(h) No motor vehicle or motor vehicle part shall be forfeited under this Code section solely on the basis that it is unidentifiable. Instead of forfeiture, any seized motor vehicle or motor vehicle part which is unidentifiable shall be the subject of a written report sent by the seizing

agency to the Department of Revenue which shall include a description of the motor vehicle or motor vehicle part, including its color, if any; the date, time, and place of its seizure; the name of the person from whose possession or control it was seized; the grounds for its seizure; and the location where the same is held or stored.

(i) When a seized unidentifiable motor vehicle or motor vehicle part has been held for 60 days or more after the notice to the Department of Revenue specified in subsection (h) of this Code section has been given, the seizing agency, or its agent, shall cause the motor vehicle or motor vehicle part to be sold at a public sale to the highest bidder. Notice of the time and place of sale shall be posted in a conspicuous place for at least 30 days prior to the sale on the premises where the motor vehicle or motor vehicle part has been stored.

(j)(1) When a seized unidentifiable motor vehicle or motor vehicle part has an apparent value of $1,000.00 or less, the seizing agency shall authorize the disposal of the motor vehicle or motor vehicle part, provided that no such disposition shall be made sooner than 60 days after the date of seizure.

(2) The proceeds of the public sale of an unidentifiable motor vehicle or motor vehicle part shall be deposited into the general fund of the state, county, or municipal corporation employing the seizing agency after deduction of any reasonable and necessary towing and storage charges.

(k) Seizing agencies shall utilize their best efforts to arrange for the towing and storing of motor vehicles and motor vehicle parts in the most economical manner possible. In no event shall the owner of a motor vehicle or a motor vehicle part be required to pay more than the minimum reasonable costs of towing and storage.

(l) A seized motor vehicle or motor vehicle part that is neither forfeited nor unidentifiable shall be held subject to the order of the court in which the criminal action is pending or, if a request for its release from such custody is made, until the prosecutor has notified the defendant or the defendant's attorney of such request and both the prosecution and defense have been afforded a reasonable opportunity for an examination of the property to determine its true value and to produce or reproduce, by photographs or other identifying techniques, legally sufficient evidence for introduction at trial or other criminal proceedings. Upon expiration of a reasonable time for the completion of the examination, which in no event shall exceed 14 days from the date of service upon the defense of the notice of request for return of property as provided in this subsection, the property shall be released to the person making such request after satisfactory proof of such person's entitlement to the possession thereof. Notwithstanding the foregoing,

upon application by either party with notice to the other, the court may order retention of the property if it determines that retention is necessary in the furtherance of justice.

(m) When a seized vehicle is forfeited, restored to its owner, or disposed of as unidentifiable, the seizing agency shall retain a report of the transaction for a period of at least one year from the date of the transaction.

(n) When an applicant for a certificate of title or salvage certificate of title presents to the Department of Revenue proof that the applicant purchased or acquired a motor vehicle at public sale conducted pursuant to this Code section and such fact is attested to by the seizing agency, the Department of Revenue shall issue a certificate of title or a salvage certificate of title, as determined by the state revenue commissioner, for such motor vehicle upon receipt of the statutory fee, a properly executed application for a certificate of title or other certificate of ownership, and the affidavit of the seizing agency that a state assigned number was applied for and affixed to the motor vehicle prior to the time that the motor vehicle was released by the seizing agency to the purchaser. (Code 1981, § 16-8-85, enacted by Ga. L. 1991, p. 1805, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 2000, p. 951, § 12-2; Ga. L. 2005, p. 334, § 6-2/HB 501; Ga. L. 2015, p. 693, § 2-8/HB 233.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

ARTICLE 5

RESIDENTIAL MORTGAGE FRAUD

16-8-101. Definitions.

As used in this article, the term:

(1) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan including, but not limited to, solicitation, application, or origination, negotiation of terms, third-party provider services, underwriting, signing and closing, and funding of the loan. Such term shall also include the execution of deeds under power of sale that are required to be recorded pursuant to Code Section 44-14-160 and the execution of assignments that are required to be recorded pursuant to subsection (b) of Code Section 44-14-162. Documents involved in the mortgage lending process include, but shall not be limited to, uniform residen-

tial loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(2) "Pattern of residential mortgage fraud" means one or more misstatements, misrepresentations, or omissions made during the mortgage lending process that involve two or more residential properties, which have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics.

(3) "Person" means a natural person, corporation, company, limited liability company, partnership, trustee, association, or any other entity.

(4) "Residential mortgage loan" means a loan or agreement to extend credit made to a person, which loan is secured by a deed to secure debt, security deed, mortgage, security interest, deed of trust, or other document representing a security interest or lien upon any interest in one-to-four family residential property located in Georgia including the renewal or refinancing of any such loan. (Code 1981, § 16-8-101, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2012, p. 668, § 1/HB 237.)

The 2012 amendment, effective July 1, 2012, in paragraph (1), added the second sentence and substituted "but shall not be limited" for "but are not limited" in the last sentence.

Law reviews. — For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

16-8-102. Residential mortgage fraud.

A person commits the offense of residential mortgage fraud when, with the intent to defraud, such person:

(1) Knowingly makes any deliberate misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(2) Knowingly uses or facilitates the use of any deliberate misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;

(3) Receives any proceeds or any other funds in connection with a residential mortgage closing that such person knew resulted from a violation of paragraph (1) or (2) of this Code section;

(4) Conspires to violate any of the provisions of paragraph (1), (2), or (3) of this Code section; or

(5) Files or causes to be filed with the official registrar of deeds of any county of this state any document such person knows to contain a deliberate misstatement, misrepresentation, or omission.

An offense of residential mortgage fraud shall not be predicated solely upon information lawfully disclosed under federal disclosure laws, regulations, and interpretations related to the mortgage lending process nor upon truthful information contained in documents filed with the official registrar of deeds of any county of this state for the stated purpose of correcting scrivener's errors, mistakes, inadvertent misstatements, or omissions contained in previously filed documents. (Code 1981, § 16-8-102, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2012, p. 668, § 2/HB 237.)

The 2012 amendment, effective July 1, 2012, added the language beginning "nor upon truthful information" and ending "previously filed documents" at the end of the ending undesignated paragraph.

16-8-106. Civil forfeiture.

(a) As used in this Code section, the terms "civil forfeiture proceedings," "proceeds," and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(b) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article and any proceeds are declared to be contraband and no person shall have a property right in them.

(c) Any property subject to forfeiture pursuant to subsection (b) of this Code section shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(d) The Attorney General shall be specifically authorized to commence civil forfeiture proceedings under this Code section. (Code 1981, § 16-8-106, enacted by Ga. L. 2005, p. 848, § 2/SB 100; Ga. L. 2015, p. 693, § 2-9/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this article shall be subject to forfeiture to the state. Forfeiture shall be had by the same procedure set forth in Code Section 16-14-7. District attorneys and the Attorney General may commence forfeiture

proceedings under this article." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

CHAPTER 9

FORGERY AND FRAUDULENT PRACTICES

Article 1

Forgery and Related Offenses

Sec.
16-9-1. Forgery; classification of forgery offenses.
16-9-2. Penalties for forgery.
16-9-3. "Writing" defined [Repealed].
16-9-4. Manufacturing, selling, or distributing false identification document; civil forfeiture; penalty.

Article 2

Deposit Account Fraud

16-9-20. Deposit account fraud.

Article 3

Illegal Use of Financial Transaction Cards

16-9-30. Definitions.
16-9-33. Financial transaction card fraud.
16-9-37. Unauthorized use of financial transaction card; misuse of government issued cards.
16-9-40. Venue determinations.

Article 6

Computer Systems Protection

Part 3

Investigation of Violations

16-9-108. Investigative and subpoena powers of district attorneys and the Attorney General.
16-9-109. Disclosures by service providers pursuant to investigations.

Article 8

Identity Fraud

16-9-120. Definitions.
16-9-123. Investigations.
16-9-127. Authority of Attorney General.
16-9-130. Damages available to consumer victim; no defense that others engage in comparable practices; service of complaint.
16-9-131. Criminal prosecution.

ARTICLE 1

FORGERY AND RELATED OFFENSES

16-9-1. Forgery; classification of forgery offenses.

(a) As used in this Code section, the term:

(1) "Bank" means incorporated banks, savings banks, banking companies, trust companies, credit unions, and other corporations doing a banking business.

(2) "Check" means any instrument for the payment or transmission of money payable on demand and drawn on a bank.

(3) "Writing" includes, but shall not be limited to, printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

(b) A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

(c) A person commits the offense of forgery in the second degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(d) A person commits the offense of forgery in the third degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of $1,500.00 or more in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses ten or more checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority.

(e) A person commits the offense of forgery in the fourth degree when with the intent to defraud he or she knowingly:

(1) Makes, alters, possesses, utters, or delivers any check written in the amount of less than $1,500.00 in a fictitious name or in such manner that the check as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority; or

(2) Possesses less than ten checks written without a specified amount in a fictitious name or in such manner that the checks as made or altered purport to have been made by another person, at

another time, with different provisions, or by authority of one who did not give such authority. (Code 1933, § 26-1701, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

The 2012 amendment, effective July 1, 2012, added subsection (a); redesignated former subsection (a) as present subsection (b); in subsection (b), inserted "the" preceding "intent to" near the beginning, inserted "or she", and inserted ", other than a check," near the middle; deleted former subsection (b), which read: "A person convicted of the offense of forgery in the first degree shall be punished by imprisonment for not less than one nor more than ten years."; and added subsections (c) through (e). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EVIDENCE

General Consideration

Intent to defraud is essence of the crime and must be proved beyond reasonable doubt.

District court's finding that the defendant was personally involved in making a fraudulent card had no bearing on whether the defendant committed forgery under O.C.G.A. § 16-9-1(b), nor did it appear to affect the defendant's sentence upon revocation of supervised release; sentence of 12 months and a day in prison and 12 months of supervised release was not error. United States v. Thomas, No. 12-13632, 2013 U.S. App. LEXIS 8317 (11th Cir. Apr. 24, 2013) (Unpublished).

Evidence did not fatally vary from indictment.

While the date on one check differed from that alleged in the indictment, the other information identifying the check was sufficient to apprise the defendant of the charge. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Evidence

Evidence sufficient for conviction.

The following evidence was sufficient to convict the defendant of felony forgery: 1) the defendant's accomplice testified to cashing forged checks supplied by defendant and giving the defendant the money; 2) surveillance tapes showed the two talking together before, and the defendant chasing the accomplice after, the checks were cashed; 3) a witness testified that, just prior to the charged offense, the witness saw the defendant use an accomplice to cash forged checks. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Evidence that the defendant borrowed a sister's car, struck the rear of a slower moving car leading to the deaths of the driver and passenger, the defendant identified herself as her sister, and the defendant signed her sister's name on the Miranda form and on her written state-

Evidence (Cont'd)

ment supported the defendant's convictions for first degree homicide by vehicle, forgery, reckless driving, and giving a false name. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153 (2012).

Evidence that the defendant received a $17,450.10 check from an entity with whom the defendant had no connection or expectation of payment and presented the check to a bank in an attempt to obtain cash was sufficient for a reasonable jury to determine that, at the very least, the defendant remained deliberately ignorant of the fraudulent nature of the checks and supported the defendant's forgery conviction. Thomas v. State, 319 Ga. App. 690, 738 S.E.2d 149 (2013).

As the jury could have inferred from the defendant's use of a photocopy of a redacted driver's license that the defendant possessed the document with an intent to defraud a prospective employer, the evidence supported the forgery conviction. Pardon v. State, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Evidence that on four of the five checks at issue, the checking account number printed on the checks was not the correct account number for the alleged issuer and the logo and signatures on the actual checks different from those on the forged checks was sufficient to support a conviction for forgery. Despite an alleged variance, the defendant was protected for further prosecution for those offenses because copies of all the checks referenced in the indictment were introduced as evidence. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Sufficient circumstantial evidence supported the defendant's conviction for forgery based on the reasonable inferences arising from the evidence showing that a check was drawn on an account of a roofing company for which the defendant never worked for, thus, the inference arose that the defendant knew that the company did not owe any money to the defendant and that the defendant was not authorized to present the check for payment. Bettes v. State, 329 Ga. App. 13, 763 S.E.2d 366 (2014).

Sufficient evidence existed to support the defendant's conviction for forgery because the evidence established that the defendant was named as the guardian in the fraudulent letters of guardianship, there was direct evidence that the defendant claimed to be the guardian of the defendant's father, and there was ample circumstantial evidence that the defendant possessed and uttered that falsified document. Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015).

Evidence insufficient to support conviction. — Because there was no competent evidence establishing that the defendant possessed or made a counterfeit money order, the evidence was not sufficient to sustain the defendant's conviction for forgery in the first degree in violation of O.C.G.A. § 16-9-1(a); the only evidence introduced at trial to prove that money orders the defendant deposited in a bank were counterfeit was copies of the processed orders themselves, but no one testified to confirm the counterfeit status of the money orders, and no one testified that the alleged payors were fictitious persons or actual persons who never gave authority for the money orders to be issued. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520 (2012).

Evidence was insufficient to support defendant's conviction, etc.

State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A. § 16-9-1(a) because the trial court erred in admitting the "counterfeit" stamps on the money orders as business records under former O.C.G.A. § 24-3-14(b) (see now O.C.G.A. § 24-8-803), and the state failed to present any other evidence to establish that the money orders were counterfeit; the testimony of the branch manager at a bank indicated that the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012).

Other crimes evidence admissible as part of res gestae. — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness

to cash forged checks and that the witness saw the defendant use an accomplice to cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Money orders stamped "apparent counterfeit" was inadmissible hearsay. — Trial court erred in admitting money orders stamped "apparent counterfeit" during the defendant's trial for forgery in the first degree, O.C.G.A. § 16-9-1(a), because the stamped money orders constituted inadmissible hearsay; the testimony of a bank's chief financial officer indicated that the determination that the money orders were counterfeit was a conclusion or opinion made by a third party institution, whose representatives did not testify at trial and, thus, the money orders were inadmissible as a business record under former O.C.G.A. § 24-3-14(b) (see now O.C.G.A. § 24-8-803) to prove that the money orders were counterfeit. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 16-9-1(e) are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

16-9-2. Penalties for forgery.

(a) A person who commits the offense of forgery in the first degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 15 years.

(b) A person who commits the offense of forgery in the second degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(c) A person who commits the offense of forgery in the third degree shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

(d) A person who commits the offense of forgery in the fourth degree shall be guilty of a misdemeanor; provided, however, that upon the third and all subsequent convictions for such offense, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years. (Code 1933, § 26-1702, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 857, § 6; Ga. L. 1982, p. 3, § 16; Ga. L. 2012, p. 899, § 3-5/HB 1176.)

The 2012 amendment, effective July 1, 2012, substituted the present provisions of subsection (a) for the former provisions, which read: "A person commits the offense of forgery in the second degree when with the intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority."; in subsection (b), substituted "who commits" for "convicted of" and inserted "guilty of a felony and, upon conviction thereof, shall be" near the middle; and added subsections (c) and (d). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Conviction for second-degree forgery.

Defendant's conviction for second degree forgery was supported by evidence that checks with a fictitious name were found under the driver's seat of the car the defendant was driving after the defendant and others attempted to present a similar fraudulent check for merchandise. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

16-9-3. "Writing" defined.

Reserved. Repealed by Ga. L. 2012, p. 899, § 3-5/HB 1176, effective July 1, 2012.

Editor's notes. — This Code section was based on Code 1933, § 26-1703, enacted by Ga. L. 1968, p. 1249, § 1.

Law reviews. — For article on the 2012 repeal of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

16-9-4. Manufacturing, selling, or distributing false identification document; civil forfeiture; penalty.

(a) As used in this Code section, the term:

(1) "Access device" means a unique electronic identification number, address, description, or routing code or a device containing a unique electronic identification number, address, description, or routing code issued to an individual which permits or facilitates entry into a facility or computer or provides access to the financial resources, including, but not limited, to the credit resources of the individual to whom the device or card is issued.

(2) "Description" means any identifying information about a person, including, but not limited to, date of birth, place of birth, address, social security number, height, weight, hair or eye color, or unique

biometric data such as fingerprint, voice print, retina or iris image, DNA profile, or other unique physical representation.

(3) "Government agency" means any agency of the executive, legislative, or judicial branch of government or political subdivision or authority thereof of this state, any other state, the United States, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(4) "Identification document" means:

(A) Any document or card issued to an individual by a government agency or by the authority of a government agency containing the name of a person and a description of the person or such person's photograph, or both, and includes, without being limited to, a passport, visa, military identification card, driver's license, or an identification card;

(B) Any document issued to an individual for the purpose of identification by or with the authority of the holder of a trademark or trade name of another, as these terms are defined in Code Section 10-1-371, that contains the trademark or trade name and the name of the person to whom the document is issued and a description of the person or the person's photograph, or both; or

(C) Any access device.

(b)(1) It shall be unlawful for any person to knowingly possess, display, or use any false, fictitious, fraudulent, or altered identification document.

(2) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with intent to sell, deliver, or distribute, or offer for sale, delivery, or distribution a false, fraudulent, or fictitious identification document or any identification document which contains any false, fictitious, or fraudulent statement or entry.

(3) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with the intent to sell, deliver, or distribute, or offer for sale, delivery, or distribution any identification document containing the trademark or trade name of another without the written consent of the owner of the trademark or trade name.

(4) It shall be unlawful for any person to knowingly possess, display, or use any false, fictitious, fraudulent, or altered identification document containing the logo or legal or official seal of a government agency or any colorable imitation thereof in furtherance

of a conspiracy or attempt to commit a violation of the criminal laws of this state or of the United States or any of the several states which is punishable by imprisonment for one year or more.

(5) It shall be unlawful for any person to knowingly manufacture, alter, sell, distribute, deliver, possess with the intent to sell, deliver, or distribute, or offer for sale or distribution any other identification document containing the logo or legal or official seal of a government agency or any colorable imitation thereof without the written consent of the government agency.

(6) It shall be unlawful for any person to knowingly possess, display, or use an identification document issued to or on behalf of another person without the permission or consent of the other person for a lawful purpose, unless the identification document is possessed, displayed, or used with the intent to restore it to the other person or government agency or other entity that issued the identification document to the person.

(c)(1) Except as provided in paragraph (2) or (3) of this subsection, any person who violates the provisions of paragraph (1), (3), or (6) of subsection (b) of this Code section shall be guilty of a misdemeanor.

(2) Except as provided in paragraph (3) of this subsection, any person who violates the provisions of paragraph (1), (3), or (6) of subsection (b) of this Code section for the second or any subsequent offense shall be guilty of a felony and shall be punished by a fine of not more than $25,000.00 or by imprisonment for not more than three years, or both.

(3) Except as provided in paragraph (5) of this subsection, any person who manufactures, alters, sells, distributes, delivers, receives, possesses, or offers for sale or distribution three or more identification documents in violation of the provisions of subsection (b) of this Code section shall be punished by imprisonment for not less than three nor more than ten years, a fine not to exceed $100,000.00, or both.

(4) Except as provided in paragraph (3) or (5) of this subsection, any person who violates the provisions of paragraph (2), (4), or (5) of subsection (b) of this Code section shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $100,000.00, or both.

(5) Any person who is under 21 years of age and violates the provisions of subsection (b) of this Code section for the purpose of the identification being used to obtain entry into an age restricted facility or being used to purchase a consumable good that is age restricted, shall, upon a first conviction thereof, be guilty of a misdemeanor and

upon a second or subsequent conviction shall be punished as for a misdemeanor of a high and aggravated nature.

(6) Any person convicted of an attempt or conspiracy to violate the provisions of subsection (b) of this Code section shall be punished by imprisonment, by a fine, or by both such punishments not to exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy.

(d) Each violation of this Code section shall constitute a separate offense.

(e) Any violation of this Code section shall be considered to have been committed in any county of this state in which the evidence shows that the identification document was manufactured, altered, sold, displayed, distributed, delivered, received, offered for sale or distribution, or possessed.

(f) The provisions of this Code section shall not apply to any lawfully authorized investigative, protective, or intelligence activity of an agency of the United States, this state, or any of the several states or their political subdivisions or any activity authorized under Chapter 224 of Title 18 of the United States Code or any similar such law relating to witness protection.

(g) It shall not be a defense to a violation of this Code section that a false, fictitious, fraudulent, or altered identification document contained words indicating that it is not an identification document.

(h)(1) As used in this subsection, the terms "proceeds" and "property" shall have the same meanings as set forth in Code Section 9-16-2.

(2) Any property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of this Code section and any proceeds are declared to be contraband and no person shall have a property right in them.

(3) Any property subject to forfeiture pursuant to paragraph (2) of this subsection shall be forfeited in accordance with the procedures set forth in Chapter 16 of Title 9.

(i) It shall be an affirmative defense to the manufacturing, selling, or distributing of identification documents that contain false, fictitious, or altered information that the person manufacturing, selling, or distributing the documents used due diligence to ascertain the truth of the information contained in the identification document. (Code 1981, § 16-9-4, enacted by Ga. L. 1988, p. 760, § 1; Ga. L. 2002, p. 551, § 1; Ga. L. 2008, p. 808, § 1/SB 421; Ga. L. 2009, p. 299, § 1/HB 71; Ga. L. 2015, p. 693, § 2-10/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (h) for the former provisions, which read: "(h)(1) Any property which is used, intended for use, or used in any manner to facilitate a violation of this Code section is contraband and forfeited to the state and no person shall have a property interest in it. Such property may be seized or detained in the same manner as provided in Code Section 16-13-49 and shall not be subject to replevin, conveyance, sequestration, or attachment.

"(2) Within 60 days of the date of the seizure of contraband pursuant to this Code section, the district attorney shall initiate forfeiture or other proceedings as provided in Code Section 16-13-49. An owner or interest holder, as defined by subsection (a) of Code Section 16-13-49, may establish as a defense to the forfeiture of property which is subject to forfeiture under this Code section the applicable provisions of subsection (e) or (f) of Code Section 16-13-49. Property which is forfeited pursuant to this Code section shall be disposed of and distributed as provided in Code Section 16-13-49.

"(3) If property subject to forfeiture cannot be located; has been transferred or conveyed to, sold to, or deposited with a third party; is beyond the jurisdiction of the court; has been substantially diminished in value while not in the actual physical custody of a receiver or governmental agency directed to maintain custody of the property; or has been commingled with other property that cannot be divided without difficulty, the court shall order the forfeiture of any property of a claimant or defendant up to the value of property found by the court to be subject to forfeiture under this subsection in accordance with the procedures set forth in subsection (x) of Code Section 16-13-49.

"(4) The provisions of paragraphs (3), (4), and (5) of subsection (x) and subsection (z) of Code Section 16-13-49 shall be applicable to any proceedings brought pursuant to this subsection." See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

ARTICLE 2

DEPOSIT ACCOUNT FRAUD

16-9-20. Deposit account fraud.

(a) A person commits the offense of deposit account fraud when such person makes, draws, utters, executes, or delivers an instrument for the payment of money on any bank or other depository in exchange for a present consideration or wages, knowing that it will not be honored by the drawee. For the purposes of this Code section, it is prima-facie evidence that the accused knew that the instrument would not be honored if:

(1) The accused had no account with the drawee at the time the instrument was made, drawn, uttered, or delivered;

(2) Payment was refused by the drawee for lack of funds upon presentation within 30 days after delivery and the accused or someone for him or her shall not have tendered the holder thereof the amount due thereon, together with a service charge, within ten days

after receiving written notice that payment was refused upon such instrument. For purposes of this paragraph:

(A) Notice mailed by certified or registered mail or statutory overnight delivery evidenced by return receipt to the person at the address printed on the instrument or given at the time of issuance shall be deemed sufficient and equivalent to notice having been received as of the date on the return receipt by the person making, drawing, uttering, executing, or delivering the instrument. A single notice as provided in subparagraph (B) of this paragraph shall be sufficient to cover all instruments on which payment was refused and which were delivered within a ten-day period by the accused to a single entity, provided that the form of notice lists and identifies each instrument; and

(B) The form of notice shall be substantially as follows:

"You are hereby notified that the following instrument(s)

Number	Date	Amount	Name of Bank
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

drawn upon _____ and payable to _____, (has) (have) been dishonored. Pursuant to Georgia law, you have ten days from receipt of this notice to tender payment of the total amount of the instrument(s) plus the applicable service charge(s) of $_____ and any fee charged to the holder of the instrument(s) by a bank or financial institution as a result of the instrument(s) not being honored, the total amount due being _____ dollars and _____ cents. Unless this amount is paid in full within the specified time above, a presumption in law arises that you delivered the instrument(s) with the intent to defraud and the dishonored instrument(s) and all other available information relating to this incident may be submitted to the magistrate for the issuance of a criminal warrant or citation or to the district attorney or solicitor-general for criminal prosecution."; or

(3) Notice mailed by certified or registered mail or statutory overnight delivery is returned undelivered to the sender when such notice was mailed within 90 days of dishonor to the person at the

address printed on the instrument or given by the accused at the time of issuance of the instrument.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as follows:

(A) When the instrument is for less than $500.00, a fine of not more than $500.00 or imprisonment not to exceed 12 months, or both;

(B) When the instrument is for $500.00 or more but less than $1,000.00, a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both; or

(C) When more than one instrument is involved and such instruments were drawn within 90 days of one another and each is in an amount less than $500.00, the amounts of such separate instruments may be added together to arrive at and be punishable under subparagraph (B) of this paragraph.

(2) Except as provided in paragraph (3) of this subsection and subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for an amount of not less than $1,000.00 nor more than $1,499.99, shall be guilty of a misdemeanor of a high and aggravated nature. When more than one instrument is involved and such instruments were given to the same entity within a 15 day period and the cumulative total of such instruments is not less than $1,000.00 nor more than $1,499.00, the person drawing and giving such instruments shall upon conviction be guilty of a misdemeanor of a high and aggravated nature.

(3) Except as provided in subsection (c) of this Code section, a person convicted of the offense of deposit account fraud, when the instrument is for $1,500.00 or more, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $5,000.00 or by imprisonment for not more than three years, or both.

(4) Upon conviction of a first or any subsequent offense under this subsection or subsection (c) of this Code section, in addition to any other punishment provided by this Code section, the defendant shall be required to make restitution of the amount of the instrument, together with all costs of bringing a complaint under this Code section. The court may require the defendant to pay as interest a monthly payment equal to 1 percent of the amount of the instrument. Such amount shall be paid each month in addition to any payments on the principal until the entire balance, including the principal and

any unpaid interest payments, is paid in full. Such amount shall be paid without regard to any reduction in the principal balance owed. Costs shall be determined by the court from competent evidence of costs provided by the party causing the criminal warrant or citation to issue; provided, however, that the minimum costs shall not be less than $25.00. Restitution may be made while the defendant is serving a probated or suspended sentence.

(c) A person who commits the offense of deposit account fraud by the making, drawing, uttering, executing, or delivering of an instrument on a bank of another state shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or by a fine in an amount of up to $1,000.00, or both.

(d) The prosecuting authority of the court with jurisdiction over a violation of subsection (c) of this Code section may seek extradition for criminal prosecution of any person not within this state who flees the state to avoid prosecution under this Code section.

(e) In any prosecution or action under this Code section, an instrument for which the information required in this subsection is available at the time of issuance shall constitute prima-facie evidence of the identity of the party issuing or executing the instrument and that the person was a party authorized to draw upon the named account. To establish this prima-facie evidence, the following information regarding the identity of the party presenting the instrument shall be obtained by the party receiving such instrument: the full name, residence address, and home phone number.

(1) Such information may be provided by either of two methods:

(A) The information may be recorded upon the instrument itself; or

(B) The number of a check-cashing identification card issued by the receiving party may be recorded on the instrument. The check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(2) In addition to the information required in this subsection, the party receiving an instrument shall witness the signature or endorsement of the party presenting such instrument and as evidence of such the receiving party shall initial the instrument.

(f) As used in this Code section, the term:

(1) "Bank" shall include a financial institution as defined in this Code section.

(2) "Conviction" shall include the entering of a guilty plea, the entering of a plea of nolo contendere, or the forfeiting of bail.

(3) "Financial institution" shall have the same meaning as defined in paragraph (21) of Code Section 7-1-4 and shall also include a national bank, a state or federal savings bank, a state or federal credit union, and a state or federal savings and loan association.

(4) "Holder in due course" shall have the same meaning as in Code Section 11-3-302.

(5) "Instrument" means a check, draft, debit card sales draft, or order for the payment of money.

(6) "Present consideration" shall include without limitation:

(A) An obligation or debt of rent which is past due or presently due;

(B) An obligation or debt of state taxes which is past due or presently due;

(C) An obligation or debt which is past due or presently due for child support when made for the support of such minor child and which is given pursuant to an order of court or written agreement signed by the person making the payment;

(D) A simultaneous agreement for the extension of additional credit where additional credit is being denied; and

(E) A written waiver of mechanic's or materialmen's lien rights.

(7) "State taxes" shall include payments made to the Georgia Department of Labor as required by Chapter 8 of Title 34.

(g) This Code section shall in no way affect the authority of a sentencing judge to provide for a sentence to be served on weekends or during the nonworking hours of the defendant as provided in Code Section 17-10-3.

(h)(1) Any party holding a worthless instrument and giving notice in substantially similar form to that provided in subparagraph (a)(2)(B) of this Code section shall be immune from civil liability for the giving of such notice and for proceeding as required under the forms of such notice; provided, however, that, if any person shall be arrested or prosecuted for violation of this Code section and payment of any instrument shall have been refused because the maker or drawer had no account with the bank or other depository on which such instrument was drawn, the one causing the arrest or prosecution shall be deemed to have acted with reasonable or probable cause even though he, she, or it has not mailed the written notice or waited for the ten-day period to elapse. In any civil action for damages which may be

brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(2) Except as otherwise provided by law, any party who holds a worthless instrument, who complies with the requirements of subsection (a) of this Code section, and who causes a criminal warrant or citation to be issued shall not forfeit his or her right to continue or pursue civil remedies authorized by law for the collection of the worthless instrument; provided, however, that if interest is awarded and collected on any amount ordered by the court as restitution in the criminal case, interest shall not be collectable in any civil action on the same amount. It shall be deemed conclusive evidence that any action is brought upon probable cause and without malice where such party holding a worthless instrument has complied with the provisions of subsection (a) of this Code section regardless of whether the criminal charges are dismissed by a court due to payment in full of the face value of the instrument and applicable service charges subsequent to the date that affidavit for the warrant or citation is made. In any civil action for damages which may be brought by the person who made, drew, uttered, executed, or delivered such instrument, no evidence of statements or representations as to the status of the instrument involved or of any collateral agreement with reference to the instrument shall be admissible unless such statements, representations, or collateral agreement shall be written simultaneously with or upon the instrument at the time it is delivered by the maker thereof.

(i) Notwithstanding paragraph (2) of subsection (a) of this Code section or any other law on usury, charges, or fees on loans or credit extensions, any lender of money or extender of other credit who receives an instrument drawn on a bank or other depository institution given by any person in full or partial repayment of a loan, installment payment, or other extension of credit may, if such instrument is not paid or is dishonored by such institution, charge and collect from the borrower or person to whom the credit was extended a bad instrument charge. This charge shall not be deemed interest or a finance or other charge made as an incident to or as a condition to the granting of the loan or other extension of credit and shall not be included in determining the limit on charges which may be made in connection with the loan or extension of credit or any other law of this state.

(j) For purposes of this Code section, no service charge or bad instrument charge shall exceed $30.00 or 5 percent of the face amount of the instrument, whichever is greater, except that the holder of the instrument may also charge the maker an additional fee in an amount equal to that charged to the holder by the bank or financial institution as a result of the instrument not being honored.

(k) An action under this Code section may be prosecuted by the party initially receiving a worthless instrument or by any subsequent holder in due course of any such worthless instrument. (Ga. L. 1959, p. 252, §§ 1-3; Code 1933, § 26-1704, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 41A-9909, enacted by Ga. L. 1974, p. 705, § 1; Ga. L. 1975, p. 482, § 1; Ga. L. 1977, p. 1266, §§ 1, 2; Ga. L. 1978, p. 2020, § 1; Ga. L. 1980, p. 1034, § 1; Ga. L. 1980, p. 1147, §§ 1-3; Ga. L. 1981, p. 1550, § 1; Ga. L. 1983, p. 484, § 1; Ga. L. 1983, p. 485, § 1; Ga. L. 1983, p. 1189, §§ 1, 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1984, p. 1435, § 1; Ga. L. 1985, p. 708, § 1; Ga. L. 1986, p. 209, § 1; Ga. L. 1987, p. 983, § 1; Ga. L. 1988, p. 268, § 1; Ga. L. 1988, p. 762, § 1; Ga. L. 1989, p. 1570, § 1; Ga. L. 1990, p. 8, § 16; Ga. L. 1994, p. 1787, § 3; Ga. L. 1995, p. 910, §§ 1, 2; Ga. L. 1996, p. 748, § 10; Ga. L. 1996, p. 1014, §§ 1, 2; Ga. L. 1999, p. 720, § 1; Ga. L. 2000, p. 1352, § 1; Ga. L. 2000, p. 1589, § 4; Ga. L. 2003, p. 140, § 16; Ga. L. 2003, p. 478, § 1; Ga. L. 2012, p. 899, § 3-6/HB 1176.)

The 2012 amendment, effective July 1, 2012, throughout paragraphs (b)(1) and (b)(2), substituted "$500.00" for "$100.00", substituted "$1,000.00" for "$300.00", and substituted "$1,499.00" for "$499.99"; and substituted "$1,500.00" for "$500.00" in paragraph (b)(3). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Check given for equipment rental. — Rational trier of fact could have found beyond a reasonable doubt that a check the defendant gave a construction rental company in exchange for equipment was presented in exchange for a present consideration within the meaning of O.C.G.A. § 16-9-20(a) because the rental of multiple pieces of construction equipment constituted a single transaction, which was not completed until the company picked up the equipment, calculated the amount due for necessary repairs, and presented the defendant with an invoice for which

the defendant immediately wrote a check; neither § 16-9-20 nor the decisions of the courts in any way limit the definition of "rent". Gibson v. State, 315 Ga. App. 639, 727 S.E.2d 251 (2012).

ARTICLE 3

ILLEGAL USE OF FINANCIAL TRANSACTION CARDS

16-9-30. Definitions.

As used in this article, the term:

(1) "Acquirer" means a business organization, government, financial institution, or an agent of a business organization, government, or financial institution that authorizes a merchant to accept payment by financial transaction card for money, goods, services, or anything else of value.

(2) "Automated banking device" means any machine which when properly activated by a financial transaction card and personal identification code may be used for any of the purposes for which a financial transaction card may be used.

(3) "Cardholder" means the person, government, or organization to whom or for whose benefit the financial transaction card is issued by an issuer.

(4) "Expired financial transaction card" means a financial transaction card which is no longer valid because the term for which it was issued has elapsed.

(5) "Financial transaction card" or "FTC" means any instrument or device, whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

(A) In obtaining money, goods, services, or anything else of value;

(B) In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

(C) In providing the cardholder access to a demand deposit account, savings account, or time deposit account for the purpose of:

(i) Making deposits of money or checks therein;

(ii) Withdrawing funds in the form of money, money orders, or traveler's checks therefrom;

(iii) Transferring funds from any demand deposit account, savings account, or time deposit account to any other demand deposit account, savings account, or time deposit account;

(iv) Transferring funds from any demand deposit account, savings account, or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein;

(v) For the purchase of goods, services, or anything else of value; or

(vi) Obtaining information pertaining to any demand deposit account, savings account, or time deposit account.

(5.1) "Financial transaction card account number" means a number, numerical code, alphabetical code, or alphanumeric code assigned by the issuer to a particular financial transaction card and which identifies the cardholder's account with the issuer.

(5.2) "Government" means:

(A) Every state department, agency, board, bureau, commission, and authority;

(B) Every county, municipal corporation, school system, or other political subdivision of this state;

(C) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, school system, or other political subdivision of this state; and

(D) Every city, county, regional, or other authority established pursuant to the laws of this state.

(6) "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(7) "Personal identification code" means a numeric or alphabetical code, signature, photograph, fingerprint, or any other means of electronic or mechanical confirmation used by the cardholder of a financial transaction card to permit authorized electronic use of that financial transaction card.

(8) "Presenting" means those actions taken by a cardholder or any person to introduce a financial transaction card into an automated banking device with or without utilization of a personal identification code or merely displaying or showing, with intent to defraud, a financial transaction card to the issuer or to any person or organiza-

tion providing money, goods, services, or anything else of value or to any other entity.

(8.1) "Purchasing card," "PCard," or "P-Card" means a type of financial transaction card allowing persons, governments, or business organizations to use financial transaction infrastructure.

(9) "Receives" or "receiving" means acquiring possession of or control of or accepting a financial transaction card as security for a loan.

(10) "Revoked financial transaction card" means a financial transaction card which is no longer valid because permission to use it has been suspended or terminated by the issuer. (Ga. L. 1960, p. 1113, § 1; Code 1933, § 26-1705, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 128, § 1; Ga. L. 1970, p. 529, §§ 1, 2; Ga. L. 1980, p. 1083, § 1; Ga. L. 1990, p. 304, § 1; Ga. L. 1996, p. 371, § 1; Ga. L. 2015, p. 266, § 1/HB 192.)

The 2015 amendment, effective July 1, 2015, in paragraph (1), inserted "'government," and ", government,"; substituted "person, government, or organization" for "person or organization named on the face of a financial transaction card" in paragraph (3); and added paragraphs (5.2) and (8.1).

16-9-31. Financial transaction card theft.

RESEARCH REFERENCES

ALR. — Criminal liability for unauthorized use of credit card under state credit card statutes, 68 ALR6th 527.

16-9-33. Financial transaction card fraud.

(a) A person commits the offense of financial transaction card fraud when, with intent to defraud the issuer; a person or organization providing money, goods, services, or anything else of value; or any other person; or cardholder, such person:

(1) Uses for the purpose of obtaining money, goods, services, or anything else of value:

(A) A financial transaction card obtained or retained or which was received with knowledge that it was obtained or retained in violation of Code Section 16-9-31 or 16-9-32;

(B) A financial transaction card which he or she knows is forged, altered, expired, revoked, or was obtained as a result of a fraudulent application in violation of subsection (d) of this Code section; or

(C) The financial transaction card account number of a financial transaction card which he or she knows has not in fact been issued

or is forged, altered, expired, revoked, or was obtained as a result of a fraudulent application in violation of subsection (d) of this Code section;

(2) Obtains money, goods, services, or anything else of value by:

(A) Representing without the consent of the cardholder that he or she is the holder of a specified card;

(B) Presenting the financial transaction card without the authorization or permission of the cardholder or issuer;

(C) Falsely representing that he or she is the holder of a card and such card has not in fact been issued; or

(D) Giving, orally or in writing, a financial transaction card account number to the provider of the money, goods, services, or other thing of value for billing purposes without the authorization or permission of the cardholder or issuer for such use;

(3) Obtains control over a financial transaction card as security for debt;

(4) Deposits into his or her account or any account by means of an automated banking device a false, fictitious, forged, altered, or counterfeit check, draft, money order, or any other such document not his or her lawful or legal property; or

(5) Receives money, goods, services, or anything else of value as a result of a false, fictitious, forged, altered, or counterfeit check, draft, money order, or any other such document having been deposited into an account via an automated banking device, knowing at the time of receipt of the money, goods, services, or item of value that the document so deposited was false, fictitious, forged, altered, or counterfeit or that the above-deposited item was not his lawful or legal property.

(b) A person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card by the cardholder or any agent or employee of such person commits the offense of financial transaction card fraud when, with intent to defraud the issuer or the cardholder, he or she:

(1) Furnishes money, goods, services, or anything else of value upon presentation of a financial transaction card obtained or retained in violation of Code Section 16-9-31 or a financial transaction card which he or she knows is forged, expired, or revoked;

(2) Alters a charge ticket or purchase ticket to reflect a larger amount than that approved by the cardholder; or

(3) Fails to furnish money, goods, services, or anything else of value which he or she represents in writing to the issuer that he or she has furnished.

(c) Conviction of the offense of financial transaction card fraud as provided in subsection (a) or (b) of this Code section is punishable as provided in subsection (a) of Code Section 16-9-38 if the value of all money, goods, services, and other things of value furnished in violation of this Code section or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this Code section does not exceed $100.00 in any six-month period. Conviction of the offense of financial transaction card fraud as provided in subsection (a) or (b) of this Code section is punishable as provided in subsection (b) of Code Section 16-9-38 if such value exceeds $100.00 in any six-month period.

(d) A person commits the offense of financial transaction card fraud when, upon application for a financial transaction card to an issuer, he or she knowingly makes or causes to be made a false statement or report relative to his or her name, occupation, employer, financial condition, assets, or liabilities or willfully and substantially overvalues any assets or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction card. Financial transaction card fraud as provided in this subsection is punishable as provided in subsection (b) of Code Section 16-9-38.

(e) A cardholder commits the offense of financial transaction card fraud when he or she willfully, knowingly, and with an intent to defraud the issuer; a person or organization providing money, goods, services, or anything else of value; or any other person submits verbally or in writing to the issuer or any other person any false notice or report of the theft, loss, disappearance, or nonreceipt of his or her financial transaction card and personal identification code. Conviction of the offense of financial transaction card fraud as provided in this subsection is punishable as provided in subsection (b) of Code Section 16-9-38.

(f) A person authorized by an acquirer to furnish money, goods, services, or anything else of value upon presentation of a financial transaction card or a financial transaction card account number by a cardholder or any agent or employee of such person, who, with intent to defraud the issuer, acquirer, or cardholder, remits to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such person, agent, or employee, commits the offense of financial transaction card fraud. Conviction of the offense of financial transaction card fraud as provided in this subsection shall be punishable as provided in subsection (b) of Code Section 16-9-38.

(g) Reserved.

(h) For purposes of this Code section, revocation shall be construed to include either notice given in person or notice given in writing to the person to whom the financial transaction card and personal identification code was issued. Notice of revocation shall be immediate when notice is given in person. The sending of a notice in writing by registered or certified mail or statutory overnight delivery in the United States mail, duly stamped and addressed to such person at his or her last address known to the issuer, shall be prima-facie evidence that such notice was duly received after seven days from the date of deposit in the mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone, and Canada, notice shall be presumed to have been received ten days after mailing by registered or certified mail or statutory overnight delivery. (Code 1933, §§ 26-1705.1, 26-1705.4, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.3, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 1990, p. 304, § 2; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 371, §§ 2, 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2015, p. 266, § 2/HB 192.)

The 2015 amendment, effective July 1, 2015, throughout this Code section, inserted "or she", inserted "or her", and made minor punctuation changes; substituted "person; or cardholder, such person" for "person, he" at the end of subsection (a); added "or issuer" at the end of subparagraph (a)(2)(B); inserted "or issuer" near the end of subparagraph (a)(2)(D); and substituted "Reserved" for the former provisions of subsection (g), which read: "In any prosecution for violation of this Code section, the state is not required to establish that all of the acts constituting the crime occurred in this state or within one city, county, or local jurisdiction, and it is no defense that some of the acts constituting the crime did not occur in this state or within one city, county, or local jurisdiction. Except as otherwise provided by Code Section 17-2-2, for purposes of venue the crime defined by this Code section shall be considered as having been committed in the county where the commission of the crime commenced.".

RESEARCH REFERENCES

ALR. — Criminal liability for unauthorized use of credit card under state credit card statutes, 68 ALR6th 527.

16-9-37. Unauthorized use of financial transaction card; misuse of government issued cards.

(a) Any person who has been issued or entrusted with a financial transaction card for specifically authorized purposes, provided such authorization is in writing stating a maximum amount charges that can be made with the financial transaction card, and who uses the financial transaction card in a manner and for purposes not authorized in order to obtain or purchase money, goods, services, or anything else of value shall be punished as provided in subsection (a) of Code Section 16-9-38.

(b) Any person who has been issued or entrusted with a financial transaction card by a government for specifically limited and specifically authorized purposes, provided such limitations and authorizations are in writing, and who uses the financial transaction card in a manner and for purposes not authorized shall be punished as provided in subsection (b) of Code Section 16-9-38. (Code 1933, § 26-1705.8, enacted by Ga. L. 1969, p. 128, § 1; Code 1933, § 26-1705.7, enacted by Ga. L. 1980, p. 1083, § 1; Ga. L. 2015, p. 266, § 3/HB 192.)

The 2015 amendment, effective July 1, 2015, designated the existing provisions as subsection (a) and added subsection (b).

Cross references. — Limitation on elected official's use of government issued purchasing or credit cards, § 36-80-24.

16-9-40. Venue determinations.

(a) In any prosecution for a violation of this article, the state is not required to establish that all of the acts constituting the crime occurred in this state or within one city, county, or local jurisdiction, and it is no defense that some of the acts constituting the crime did not occur in this state or within one city, county, or local jurisdiction. Except as otherwise provided by Code Section 17-2-2, for purposes of venue, the crime defined by this Code section shall be considered as having been committed in the county where the commission of the crime commenced.

(b) In any prosecution for a violation of this article by a public official or government employee, using government funds or a financial transaction card issued to such official or government employee by or on behalf of government, the crime shall be considered to have been committed in the county in which such public official holds office or such government employee is employed. (Code 1981, § 16-9-40, enacted by Ga. L. 2015, p. 266, § 4/HB 192.)

Effective date. — This Code section became effective July 1, 2015.

ARTICLE 4

FRAUD AND RELATED OFFENSES

16-9-58. Failing to pay for natural products or chattels.

JUDICIAL DECISIONS

Construction. — Plain language of O.C.G.A. § 16-9-58 criminalizes acting with fraudulent intent to buy the enumerated items and failing or refusing to pay for those items within a certain time, and the crime is not complete until the failure or refusal to pay occurs. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Venue. — Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 because the stipulated facts did not include that the transaction at issue included an explicit due date under the terms of a written contract; O.C.G.A. § 16-9-58 does not specify that it pertains only to "cash sales," nor does it turn on when title passes to the buyer because the statute was specifically revised to extend its application to "all sales," and payment must be made within 20 days following receipt of such products or chattels or by such other payment due date explicitly stated in a written contract, whichever is later. Babbitt v. State, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

ARTICLE 6

COMPUTER SYSTEMS PROTECTION

Part 1

Computer Crimes

Law reviews. — For article, "Intellectual Property Checklist for Marketing the Recording Artist Online," see 18 J. Intell. Prop. L. 541 (2011).

16-9-92. Definitions.

JUDICIAL DECISIONS

Without authority.

Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Damages for computer trespass. — Because the collection agency received the applications to run the agency's business from the independent contractor and the independent contractor provided technical support and maintenance services to the collection agency, the collection agency received value in exchange for the money the agency paid to the independent contractor, and the agency's cost of compensating the independent contractor during that time period was not an element of damages that resulted from the independent contractor's computer trespass for which the agency could receive reimbursement. Ware v. Am. Recovery Solution

Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Independent contractor committed computer trespass because the independent contractor did not have authorization to use the login and password of the chief financial officer of the collection agency to access the server and to disable an administrative login or alter a program, and the independent contractor's actions first completely shut down the collection agency and then hampered the agency's ability to operate for a significant length of time. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

16-9-93. Computer crimes defined; exclusivity of article; civil remedies; criminal penalties.

Law reviews. — For annual survey on torts, see 64 Mercer L. Rev. 287 (2012).

JUDICIAL DECISIONS

Claim did not state a violation.

Trial court did not err in denying a former employee's claims under the Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93, because the actions of a former employer's president in perusing the employee's email on the computer that the employee used in conducting business for the employer were not taken without authority; the president had authority to inspect the employee's computer pursuant to the computer usage policy contained in the employee manual, which the employee had agreed to abide by when the employee started work with the employer, and the president acted in order to obtain evidence in connection with an investigation of improper employee behavior. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Former employee was not guilty of computer theft when the employee accessed clients' tax returns through a client portal, not though the network, using passwords obtained from the clients. Drawdy CPA Servs., P.C. v. N. GA CPA Servs., P.C., 320 Ga. App. 759, 740 S.E.2d 712 (2013).

Damages for computer trespass. — Because the collection agency received the applications to run the agency's business from the independent contractor and the independent contractor provided technical support and maintenance services to the collection agency, the collection agency received value in exchange for the money the agency paid to the independent contractor, and the agency's cost of compensating the independent contractor during that time period was not an element of damages that resulted from the independent contractor's computer trespass for which the agency could receive reimbursement. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

Computer trespass. — Independent contractor committed computer trespass because the independent contractor did not have authorization to use the login and password of the chief financial officer of the collection agency to access the server and to disable an administrative login or alter a program, and the independent contractor's actions first completely shut down the collection agency and then hampered the agency's ability to operate for a significant length of time. Ware v. Am. Recovery Solution Servs., 324 Ga. App. 187, 749 S.E.2d 775 (2013).

RESEARCH REFERENCES

ALR. — Invasion of privacy by using or obtaining e-mail or computer files, 68 ALR6th 331.

PART 3

INVESTIGATION OF VIOLATIONS

16-9-108. Investigative and subpoena powers of district attorneys and the Attorney General.

(a) In any investigation of a violation of this article or any investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, 16-5-90, Article 8 of Chapter 5 of this title, or Article 8 of this chapter involving the use of a computer in furtherance of the act, the Attorney General or any district attorney shall have the power to administer oaths; to call any party to testify under oath at such investigation; to require the attendance of witnesses and the production of books, records, and papers; and to take the depositions of witnesses. The Attorney General or any such district attorney is authorized to issue a subpoena for any witness or a subpoena to compel the production of any books, records, or papers.

(b) In case of refusal to obey a subpoena issued under this Code section to any person and upon application by the Attorney General or district attorney, the superior court in whose jurisdiction the witness is to appear or in which the books, records, or papers are to be produced may issue to that person an order requiring him or her to appear before the court to show cause why he or she should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court. (Code 1981, § 16-9-108, enacted by Ga. L. 2005, p. 199, § 4/SB 62; Ga. L. 2013, p. 524, § 1-2/HB 78.)

The 2013 amendment, effective July 1, 2013, substituted "Article 8 of Chapter 5 of this title, or Article 8 of this chapter" for "or Article 8 of Chapter 9 of Title 16" in the first sentence of subsection (a).

16-9-109. Disclosures by service providers pursuant to investigations.

(a) Any law enforcement unit, the Attorney General, or any district attorney who is conducting an investigation of a violation of this article or an investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, or 16-5-90, Article 8 of Chapter 5 of this title, or Article 8 of this chapter involving the use of a computer, cellular telephone, or any other electronic device used in furtherance of the act may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less pursuant to a search warrant issued under the provisions of Article 2 of Chapter 5 of Title 17

by a court with jurisdiction over the offense under investigation. Such court may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days as set forth in subsection (b) of this Code section.

(b)(1) Any law enforcement unit, the Attorney General, or any district attorney may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service, exclusive of the contents of communications, only when any law enforcement unit, the Attorney General, or any district attorney:

(A) Obtains a search warrant as provided in Article 2 of Chapter 5 of Title 17;

(B) Obtains a court order for such disclosure under subsection (c) of this Code section; or

(C) Has the consent of the subscriber or customer to such disclosure.

(2) A provider of electronic communication service or remote computing service shall disclose to any law enforcement unit, the Attorney General, or any district attorney the:

(A) Name;

(B) Address;

(C) Local and long distance telephone connection records, or records of session times and durations;

(D) Length of service, including the start date, and types of service utilized;

(E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service when any law enforcement unit, the Attorney General, or any district attorney uses a subpoena authorized by Code Section 16-9-108, 35-3-4.1, or 45-15-17 or a grand jury or trial subpoena when any law enforcement unit, the Attorney General, or any district attorney complies with paragraph (1) of this subsection.

(3) Any law enforcement unit, the Attorney General, or any district attorney receiving records or information under this subsection shall

not be required to provide notice to a subscriber or customer. A provider of electronic communication service or remote computing service shall not disclose to a subscriber or customer the existence of any search warrant or subpoena issued pursuant to this article nor shall a provider of electronic communication service or remote computing service disclose to a subscriber or customer that any records have been requested by or disclosed to any law enforcement unit, the Attorney General, or any district attorney pursuant to this article.

(c) A court order for disclosure issued pursuant to subsection (b) of this Code section may be issued by any superior court with jurisdiction over the offense under investigation and shall only issue such court order for disclosure if any law enforcement unit, the Attorney General, or any district attorney offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of an electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this Code section, on a motion made promptly by a provider of electronic communication service or remote computing service, may quash or modify such order, if compliance with such order would be unduly burdensome or oppressive on such provider.

(d)(1) Any records supplied pursuant to this part shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(A) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records;

(B) The copy is a true copy of all the records described in the subpoena, court order, or search warrant and the records were delivered to the attorney, the attorney's representative, or the director of the Georgia Bureau of Investigation or the director's designee;

(C) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;

(D) The sources of information and method and time of preparation were such as to indicate its trustworthiness;

(E) The identity of the records; and

(F) A description of the mode of preparation of the records.

(2) If the business has none or only part of the records described, the custodian or other qualified witness shall so state in the affidavit.

(3) If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to

the matters stated in the affidavit, the copy of the records shall be admissible in evidence. When more than one person has knowledge of the facts, more than one affidavit shall be attached to the records produced.

(4) No later than 30 days prior to trial, a party intending to offer such evidence produced in compliance with this subsection shall provide written notice of such intentions to the opposing party or parties. A motion opposing the admission of such evidence shall be filed within ten days of the filing of such notice, and the court shall hold a hearing and rule on such motion no later than ten days prior to trial. Failure of a party to file such motion opposing admission prior to trial shall constitute a waiver of objection to such records and affidavit. However, the court, for good cause shown, may grant relief from such waiver. (Code 1981, § 16-9-109, enacted by Ga. L. 2005, p. 199, § 4/SB 62; Ga. L. 2006, p. 72, § 16/SB 465; Ga. L. 2007, p. 283, § 1/SB 98; Ga. L. 2013, p. 524, § 1-3/HB 78.)

The 2013 amendment, effective July 1, 2013, inserted ", Article 8 of Chapter 5 of this title," near the beginning of subsection (a).

ARTICLE 8

IDENTITY FRAUD

16-9-120. Definitions.

As used in this article, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Business victim" means any individual or entity that provided money, credit, goods, services, or anything of value to someone other than the intended recipient where the intended recipient has not given permission for the actual recipient to receive it and the individual or entity that provided money, credit, goods, services, or anything of value has suffered financial loss as a direct result of the commission or attempted commission of a violation of this article.

(3) "Consumer victim" means any individual whose personal identifying information has been obtained, compromised, used, or recorded in any manner without the permission of that individual.

(4) "Health care records" means records however maintained and in whatever form regarding an individual's health, including, but not limited to, doctors' and nurses' examinations and other notes, examination notes of other medical professionals, hospital records, rehabilitation facility records, nursing home records, assisted living

facility records, results of medical tests, X-rays, CT scans, MRI scans, vision examinations, pharmacy records, prescriptions, hospital charts, surgical records, mental health treatments and counseling, dental records, and physical therapy notes and evaluations.

(5) "Identifying information" shall include, but not be limited to:

(A) Current or former names;

(B) Social security numbers;

(C) Driver's license numbers;

(D) Checking account numbers;

(E) Savings account numbers;

(F) Credit and other financial transaction card numbers;

(G) Debit card numbers;

(H) Personal identification numbers;

(I) Electronic identification numbers;

(J) Digital or electronic signatures;

(K) Medical identification numbers;

(L) Birth dates;

(M) Mother's maiden name;

(N) Selected personal identification numbers;

(O) Tax identification numbers;

(P) State identification card numbers issued by state departments;

(Q) Veteran and military medical identification numbers; and

(R) Any other numbers or information which can be used to access a person's or entity's resources or health care records.

(6) "Resources" includes, but is not limited to:

(A) A person's or entity's credit, credit history, credit profile, and credit rating;

(B) United States currency, securities, real property, and personal property of any kind;

(C) Credit, charge, and debit accounts;

(D) Loans and lines of credit;

(E) Documents of title and other forms of commercial paper recognized under Title 11;

(F) Any account, including a safety deposit box, with a financial institution as defined by Code Section 7-1-4, including a national bank, federal savings and loan association, or federal credit union or a securities dealer licensed by the Secretary of State or the federal Securities and Exchange Commission;

(G) A person's personal history, including, but not limited to, records of such person's driving records; criminal, medical, or insurance history; education; or employment; and

(H) A person's health insurance, health savings accounts, health spending accounts, flexible spending accounts, medicare accounts, Medicaid accounts, dental insurance, vision insurance, and other forms of health insurance and health benefit plans. (Code 1981, § 16-9-120, enacted by Ga. L. 1998, p. 865, § 2; Ga. L. 2002, p. 551, § 2; Ga. L. 2013, p. 1059, § 1/SB 170; Ga. L. 2015, p. 1088, § 13/SB 148.)

The 2013 amendment, effective July 1, 2013, added paragraph (4); redesignated former paragraphs (4) and (5) as present paragraphs (5) and (6); in paragraph (5), deleted "or" at the end of subparagraph (5)(P), added subparagraph (5)(Q), redesignated former subparagraph (5)(Q) as present subparagraph (5)(R), and, in subparagraph (5)(R), inserted "or health care records" at the end; and, in paragraph (6), deleted "and" at the end of subparagraph (6)(F), in subparagraph (6)(G), inserted commas following "including" and "limited to" and added "; and" at the end, and added subparagraph (6)(H).

The 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (1) for the former provisions, which read: "'Administrator' means the administrator appointed under Part 2 of Article 15 of Chapter 1 of Title 10, the 'Fair Business Practices Act of 1975.'"

Cross references. — Use of personally identifiable data in court documentation, § 15-10-54.

JUDICIAL DECISIONS

Conviction upheld.

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate their resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

16-9-121. Elements of offense.

JUDICIAL DECISIONS

Evidence sufficient for conviction.

Defendant was properly convicted of financial identity fraud in violation of O.C.G.A. § 16-9-120 because the circumstantial evidence was sufficient to authorize a jury to find that the defendant, either directly or as a party to a crime under O.C.G.A. § 16-2-20, committed financial identity fraud by accessing the resources of the victims through the use of identifying information without the authorization or permission of the victims, with the intent to unlawfully appropriate the victim's resources to the defendant's own use; the federal tax identification number of either victim was required as part of the credit card application to obtain temporary charge passes, which the defendant used to purchase thousands of dollars worth of merchandise in a short period of time. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Evidence that the defendant, as a police officer, had access to a nationwide database that included people's personal information such as social security numbers; that the taxpayer identification number that the defendant provided to the cellular telephone company belonged to a Pennsylvania woman, who had not given the defendant permission to use it; and that each of the defendant's businesses were registered with the state under federal identification numbers that did not match the disputed social security number was sufficient to support the defendant's conviction for financial identity fraud. Gaskins v. State, 318 Ga. App. 8, 733 S.E.2d 338 (2012).

Evidence was sufficient to support the codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the codefendant's admission that the codefendant provided the identifying information of several current and former tenants of the apartment complex the codefendant worked at to a third party and, even though the codefendant did not know the identity of the other persons involved in the scheme nor the details of the operation, the codefendant was concerned in the commission of the crime and intentionally aided or abetted in the commission of the crime by providing the information. Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Testimony from the victims that the account numbers used belonged to the victims and the victims did not give the defendant, or anyone else, permission to use or possess those numbers was sufficient to support the defendant's conviction for identity fraud. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

Evidence insufficient for conviction.

Evidence was not sufficient to support defendant's conviction for identity fraud, because the applicable version O.C.G.A. § 16-9-121(a)(1), did not make fraudulent use of the identifying information of a corporation punishable as identity fraud, but only protected an individual person's information. Martinez v. State, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

Cited in Davis v. State, 319 Ga. App. 501, 736 S.E.2d 160 (2012).

RESEARCH REFERENCES

ALR. — Criminal liability for unauthorized use of credit card under state credit card statutes, 68 ALR6th 527.

16-9-121.1. Offense of aggravated identity fraud.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011). For article, "State Government: Illegal Immigration

Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement by investigators of Enforcement Division of the State Board of Workers' Compensation. — Investigators of the Enforcement Division who are certified as peace officers may enforce the aggravated identity fraud statute, O.C.G.A. § 16-9-121.1, by arrest and the execution of search warrants provided that the arrest and search is the result of a criminal investigation of an alleged violation of the workers' compensation laws of O.C.G.A. Ch. 9, T. 34. 2012 Op. Att'y Gen. No. 12-3.

16-9-123. Investigations.

The Attorney General shall have the authority to investigate any complaints of consumer victims regarding identity fraud. In conducting such investigations the Attorney General shall have all investigative powers which are available to the Attorney General under Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975." If, after such investigation, the Attorney General determines that a person has been a consumer victim of identity fraud in this state, the Attorney General shall, at the request of the consumer victim, provide the consumer victim with certification of the findings of such investigation. Copies of any and all complaints received by any law enforcement agency of this state regarding potential violations of this article shall be transmitted to the Georgia Bureau of Investigation. The Georgia Bureau of Investigation shall maintain a repository for all complaints in the State of Georgia regarding identity fraud. Information contained in such repository shall not be subject to public disclosure. The information in the repository may be transmitted to any other appropriate investigatory agency or entity. Consumer victims of identity fraud may file complaints directly with the office of the Attorney General, the Georgia Bureau of Investigation, or with local law enforcement. Any and all transmissions authorized under this Code section may be transmitted electronically, provided that such transmissions are made through a secure channel for the transmission of such electronic communications or information, the sufficiency of which is acceptable to the Attorney General. Nothing in this Code section shall be construed to preclude any otherwise authorized law enforcement or prosecutorial agencies from conducting investigations and prosecuting offenses of identity fraud. (Code 1981, § 16-9-122, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-123, as redesignated by Ga. L. 2002, p. 551, § 2; Ga. L. 2008, p. 601, § 1/SB 388; Ga. L. 2015, p. 1088, § 14/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" throughout this Code section; substituted "Attorney General"

for "administrator appointed under Code Section 10-1-395" in the first sentence; substituted "office of the Attorney General" for "Governor's Office of Consumer Affairs" in the eighth sentence; deleted the former ninth sentence, which read: "Employees of the Governor's Office of Consumer Affairs may communicate with consumer victims."; and substituted "Attorney General" for "Governor's Office of Consumer Affairs" in the next-to-last sentence.

16-9-125. County of offense.

JUDICIAL DECISIONS

Venue established. — State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. Zachery v. State, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Evidence was sufficient to support the codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the state introducing evidence that the victims' identifying information was found in the Henry County, Georgia, residence of the defendant, and twelve of the victims testified at trial that the defendants did not authorize any such use of the defendant's identifying information, and the codefendant admitted in the codefendant's statement that the codefendant was a party to the crime in that the codefendant provided the victims' identifying information to an unauthorized third party, thus, the evidence was sufficient to allow the jury to find that at least part of the identity fraud took place in Henry County, regardless of whether the codefendant was ever actually in that county. Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

16-9-126. Penalty for violations.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

16-9-127. Authority of Attorney General.

The Attorney General shall have authority to initiate any proceedings and to exercise any power or authority in the same manner as if he or she were acting under Part 2 of Article 15 of Chapter 1 of Title 10, as regards violations or potential violations of this article. (Code 1981, § 16-9-126, enacted by Ga. L. 1998, p. 865, § 2; Code 1981, § 16-9-127, as redesignated by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 15/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" near the beginning of this Code section.

16-9-128. Exemptions.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

16-9-130. Damages available to consumer victim; no defense that others engage in comparable practices; service of complaint.

(a) Any consumer victim who suffers injury or damages as a result of a violation of this article may bring an action individually or as a representative of a class against the person or persons engaged in such violations under the rules of civil procedure to seek equitable injunctive relief and to recover general and punitive damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, punitive damages shall be awarded only in cases of intentional violation. A claim under this article may also be asserted as a defense, setoff, cross-claim, or counterclaim or third-party claim against such person.

(b) A court shall award three times actual damages for an intentional violation.

(c) If the court finds in any action that there has been a violation of this article, the consumer victim injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and expenses of litigation incurred in connection with said action.

(d) It shall not be a defense in any action under this article that others were, are, or will be engaged in like practices.

(e) In any action brought under this article the Attorney General shall be served by certified or registered mail or statutory overnight delivery with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The Attorney General shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the Attorney General. (Code 1981, § 16-9-130, enacted by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 16/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" throughout subsection (e).

Law reviews. — For article, "Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?," see 62 Mercer L. Rev. 449 (2011).

JUDICIAL DECISIONS

Civil liability not proven. — Employee pointed to no evidence creating a reasonable inference that the three former coworkers willfully and fraudulently used the employee's identifying information in violation of Georgia law because the employee only speculated that the type of information used in the identity theft may have come from the employment application. Wells v. Gen. Dynamics Info. Tech. Inc., No. 13-12962, 2014 U.S. App. LEXIS 12981 (11th Cir. July 1, 2014) (Unpublished).

16-9-131. Criminal prosecution.

Whenever an investigation has been conducted by the Attorney General under this article and such investigation reveals conduct which constitutes a criminal offense, the Attorney General shall have the authority to prosecute such cases or forward the results of such investigation to any other prosecuting attorney of this state who shall commence any criminal prosecution that he or she deems appropriate. (Code 1981, § 16-9-131, enacted by Ga. L. 2002, p. 551, § 2; Ga. L. 2015, p. 1088, § 17/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "Governor's Office of Consumer Affairs" near the beginning, substituted "Attorney General shall have the authority to prosecute such cases or" for "administrator shall" near the middle, and substituted "to any other" for "to the Attorney General or other" near the end.

CHAPTER 10

OFFENSES AGAINST PUBLIC ADMINISTRATION

Article 2

Obstruction of Public Administration and Related Offenses

Sec.
16-10-20.1. Filing false documents.
16-10-24. Obstructing or hindering law enforcement officers.
16-10-24.4. Obstructing or hindering park ranger.
16-10-33. Removal or attempted removal of weapon from public official; punishment.
16-10-34. Use of laser devices against law enforcement officer.

Article 3

Escape and Other Offenses Related to Confinement

16-10-52. Escape.

Article 5

Offenses Related to Judicial and Other Proceedings

16-10-97. Intimidation or injury of any officer in or of any court.

ARTICLE 1

ABUSE OF GOVERNMENTAL OFFICE

16-10-1. Violation of oath by public officer.

JUDICIAL DECISIONS

Evidence sufficient for conviction. Evidence supported the defendant's conviction for violation of oath of office as the jury was authorized to find that the defendant, a police officer, obtained the victim's taxpayer identification number without authorization by using the police database with personal information in the database. Gaskins v. State, 318 Ga. App. 8, 733 S.E.2d 338 (2012).

16-10-2. Bribery.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Statute of limitation. — Because the existence, execution, and timing of an agreement that allegedly violated the bribery statute were unknown to the State before February 2010, the statute of limitation for the bribery charge was tolled until it was discovered; and the trial court did not err by denying the defendant's plea in bar based on the expiration of the statute of limitation. Kenerly v. State, 325 Ga. App. 412, 750 S.E.2d 822 (2013).

ADVISORY OPINIONS OF THE STATE BAR

Committing offense results in Rules of Professional Conduct violation. — If an attorney were to indicate to an officer that as a result of the attorney's position as a member of the city council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, O.C.G.A. §16-10-2(a)(1), or extortion, O.C.G.A. §16-8-16(a)(4). The attorney would also have violated Rule 3.5(a) of the Georgia Rules of Professional Conduct. Adv. Op. No. 05-12 (July 25, 2006).

16-10-6. Sale of real or personal property to political subdivision by local officer or employee; exceptions; limitation of civil liability.

JUDICIAL DECISIONS

Ordinance did not preempt statute. — Miller County, Ga., Ordinance No. 10-01, § 3 does not purport to supplant O.C.G.A. § 16-10-6 because the effect of § 3 is to strengthen O.C.G.A. § 16-10-6 by a broader prohibition with additional specific requirements for any exception; the county had authority, as an incident of the county's home rule power, to enact Miller County, Ga., Ordinance No. 10-01, § 3 so long as the ordinance did not conflict with general law. Bd. of Comm'rs v.

Callan, 290 Ga. 327, 720 S.E.2d 608 (2012).

ARTICLE 2

OBSTRUCTION OF PUBLIC ADMINISTRATION AND RELATED OFFENSES

16-10-20. False statements and writings, concealment of facts, and fraudulent documents in matters within jurisdiction of state or political subdivisions.

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Constitutionality.

False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend, that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because the statement could result in harm to the government. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Venue of the crime of making a false statement, etc.

Defendant's conviction for making a false statement in violation of O.C.G.A. § 16-10-20 was reversed because the state offered no proof that the jail where the alleged statement was made was in a particular county and since the defendant was also driven, the false statement may have been made in another county. Stockard v. State, 327 Ga. App. 184, 755 S.E.2d 548 (2014).

False statement to government agency.

O.C.G.A. § 16-10-20 requires proof that the defendant knowingly and willfully made a false statement and that he or she knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency, but this does not require proof that the defendant made the false statement directly to the government agency, although in such cases it would normally be undisputed that the defendant knew and intended that the statement came within the jurisdiction of the agency; however, the statute does require the defendant to have made the false statement in some intended relationship to a matter within the state or local agency's jurisdiction, that is, to have contemplated that the statement would come to the attention of an agency with the authority to act on the statement. Furthermore, knowingly and willfully making a false statement in a matter within a government agency's jurisdiction is a lie that threatens to deceive and thereby harm the government, if only because the government may need to expend time and resources to determine the truth. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Evidence supported the defendant's conviction for making a false statement or writing in violation of O.C.G.A.

§ 16-10-20 when the defendant executed a false Cancellation of Certificate of Title for Scrap Vehicles form, representing that there were no security interests in the vehicle, because the form clearly stated that the form was to be sent to the Department of Revenue — Motor Vehicles Division. Edwards v. State, 330 Ga. App. 732, 769 S.E.2d 150 (2015).

False statement to police.

Trial judge's explanation to a defendant's counsel that based on counsel's questioning of an investigator regarding the defendant's statement to the investigator that the defendant lived in Florida, the judge was going to expand the indictment to include falsifying or concealing a material fact, which was one possible violation of O.C.G.A. § 16-10-20, when the defendant had only been charged with making a false statement, did not constitute an improper remark under O.C.G.A. § 17-8-57 because it was a colloquy with counsel regarding possible jury charges and did not express an opinion on what had or had not been proved. Adams v. State, 312 Ga. App. 570, 718 S.E.2d 899 (2011), cert. denied, 2012 Ga. LEXIS 263 (Ga. 2012).

False statements in application for warrant. — Evidence that the defendant filed an application for an arrest warrant against an officer who had attempted to pass the defendant some forms the defendant requested and that the defendant's failure to accept the forms caused the forms to fall and possibly brush the defendant's face was sufficient to show the defendant knowingly made a false statement or writing and supported a conviction for such. Simpson v. State, 327 Ga. App. 516, 759 S.E.2d 590 (2014).

Award of restitution was proper. — Trial court properly ordered that restitution was to be made directly to the homeowners, even if the homeowners technically were not the direct victims of the crime which the defendant, a contractor, committed of false statement and writing, concealment of facts, under O.C.G.A. § 16-10-20, in applying for a building permit because the homeowners suffered damages due to the lack of oversight of the defendant's work. The evidence at trial directly linked this lack of oversight to the defendant's misrepresentations on the building permit application, and demonstrated that if the defendant had submitted an application that accurately reflected the extent of the work to be performed for the homeowners, more safeguards would have been in place, which would have prevented the extent of the damage. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Requirements for state to prove.

State proved that the false statement alleged in the indictment was made in a matter within the jurisdiction of the Georgia Bureau of Investigation (GBI) because the GBI was actively investigating a missing person case; because two videos contained clues referencing a Georgia missing person and the location of a missing person's body parts in Augusta, and it was then determined that the computer from which the videos were being posted was in Georgia, the jury could reasonably infer that the other missing person cases referenced in the first video would have a Georgia connection, giving the GBI jurisdiction to investigate the cases. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Award of restitution proper upon defendant's conviction for false statement. — Trial court's award of restitution to the homeowners was supported by a preponderance of the evidence because the homeowners essentially suffered the entire loss of use of their home, and the trial court determined that these damages flowed from the defendant's false statement which allowed the defendant, a contractor, to skip the requirements for structural engineering and architectural reports on the contractor's renovation of the owners' residence and to avoid county inspections, which would have avoided or detected problems as the problems arose. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

16-10-20.1. Filing false documents.

(a) As used in this Code section, the term "document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and shall include, but shall not be limited to, liens, encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property, or other records, statements, or representations of fact, law, right, or opinion.

(b) Notwithstanding Code Sections 16-10-20 and 16-10-71, it shall be unlawful for any person to:

(1) Knowingly file, enter, or record any document in a public record or court of this state or of the United States knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation; or

(2) Knowingly alter, conceal, cover up, or create a document and file, enter, or record it in a public record or court of this state or of the United States knowing or having reason to know that such document has been altered or contains a materially false, fictitious, or fraudulent statement or representation.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than ten years, a fine not to exceed $10,000.00, or both.

(d) This Code section shall not apply to a court clerk, registrar of deeds, or any other government employee who is acting in the course of his or her official duties. (Code 1981, § 16-10-20.1, enacted by Ga. L. 2012, p. 90, § 1/HB 997; Ga. L. 2014, p. 741, § 1/HB 985.)

Effective date. — This Code section became effective July 1, 2012.

The 2014 amendment, effective July 1, 2014, rewrote subsections (a) and (b) and added subsection (d).

Cross references. — Public officers and employees, T. 45.

16-10-23. Impersonating a public officer or employee.

JUDICIAL DECISIONS

Applicability to public employees. — Habeas court erred in finding that O.C.G.A. § 16-10-23 was vague and ambiguous as applied to a person charged with impersonating an employee of the Department of Family and Children Services; the statute clearly gave notice that the statute applied to public employees as well as public officers, and the statute's purpose was served by including employees. Kennedy v. Carlton, 294 Ga. 576, 757 S.E.2d 46 (2014).

16-10-24. Obstructing or hindering law enforcement officers.

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

(b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, correctional officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or conservation ranger in the lawful discharge of his or her official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Laws 1833, Cobb's 1851 Digest, p. 806; Code 1863, § 4370; Ga. L. 1865-66, p. 233, § 2; Code 1868, § 4408; Code 1873, § 4476; Code 1882, § 4476; Penal Code 1895, § 306; Penal Code 1910, § 311; Code 1933, § 26-4401; Code 1933, § 26-2505, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1986, p. 484, § 1; Ga. L. 2015, p. 422, § 5-22/HB 310.)

The 2015 amendment, effective July 1, 2015, in the middle of subsection (b), substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "probation supervisor, parole supervisor" and inserted "or her". See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Analysis

General Consideration
Lawful Discharge of Official Duties
Knowledge
Application
Jury Instructions

General Consideration

Construction with O.C.G.A. § 16-5-23. — Crimes of felony obstruction of a law enforcement officer and simple battery on a law enforcement officer did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime, and the rule of lenity did not apply; although the defendant was convicted of both charged crimes, the trial court properly merged the misdemeanor battery conviction into the felony obstruction conviction. McMullen v. State, 325 Ga. App. 757, 754 S.E.2d 798 (2014).

Application with O.C.G.A. § 16-10-56. — Defendant's act of swinging the defendant's fist at the deputy satisfied the elements of both riot in a penal institution under O.C.G.A. § 16-10-56(a), and obstruction of a law enforcement officer by offering violence under O.C.G.A. § 16-10-24(b), and because the two defined crimes did not address the same

General Consideration (Cont'd)

criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime and the rule of lenity did not apply. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015).

Civil rights action. — In a 42 U.S.C. § 1983 case in which a pro se inmate appealed a district court's 28 U.S.C. § 1915A dismissal of the inmate's claims for false arrest and false imprisonment as barred by the Heck decision, the district court's dismissal was premature since the inmate had not been convicted of violating O.C.G.A. § 16-10-24 when the district court conducted the court's frivolity review. Nonetheless, the error was harmless since the inmate failed to demonstrate that the inmate's conviction under § 16-10-24 had been reversed or invalidated; the inmate's claims for false arrest and false imprisonment were now barred by the Heck decision. Taylor v. Freeman, No. 10-13573, 2011 U.S. App. LEXIS 22997 (11th Cir. Nov. 16, 2011) (Unpublished).

After an arrestee refused a deputy's order to turn around and pushed away from the deputy, the arrestee's excessive force claim failed because, inter alia, the arrestee was uncooperative, a video showed the close contact and the escalating nature of the incident, and the arrestee's refusal to comply with the deputy's instructions was, at least, misdemeanor obstruction. Anthony v. Coffee County, No. 13-15477, 2014 U.S. App. LEXIS 16897 (11th Cir. Sept. 2, 2014) (Unpublished).

Officer without probable cause to arrest. — Defendant officer was not entitled to qualified immunity on plaintiff's Fourth Amendment claim because the officer had no arguable probable cause to arrest the plaintiff for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) or disorderly conduct under O.C.G.A. § 16-11-39(a)(3) as it was undisputed that the plaintiff uttered an epithet as the plaintiff was walking away, thus ending any face-to-face confrontation, and that the officer was the only one to hear the phrase. Further, there was no arguable probable cause to arrest the plaintiff. Merenda v. Tabor, No. 5:10-CV-493 (MTT), 2012 U.S. Dist. LEXIS 63782 (M.D. Ga. May 7, 2012), aff'd in part, appeal dismissed in part, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Ga. 2013).

Sentence in violation of plea agreement. — Following the state agreeing to dismiss the RICO and theft charges against the defendant in exchange for a guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer conditioned upon the defendant testifying truthfully at the trial against the co-defendants, the trial court erred by imposing a sentence upon the defendant which differed from the understood terms of the negotiated plea. Lewis v. State, 330 Ga. App. 412, 767 S.E.2d 771 (2014).

Career offender implications from conviction. — Defendant was properly sentenced as an armed career criminal because the defendant's 1998 Georgia felony conviction for obstructing or hindering a law enforcement officer was a violent felony and the defendant's 1998 Georgia felony conviction for possessing marijuana with the intent to distribute fell squarely within the Armed Career Criminal Act's definition of a serious drug offense. United States v. Dixon, No. 14-11164, 2015 U.S. App. LEXIS 1698 (11th Cir. Feb. 4, 2015) (Unpublished).

Issue waived on appeal regarding legitimacy of arrest. — Defendant waived the right to challenge the sufficiency of the evidence regarding whether a police officer was in the lawful discharge of official duties for purposes of the defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), as defense counsel conceded at trial that the officer's arrest was "legitimate," and no action was taken to suggest otherwise. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Cited in Myers v. State, 311 Ga. App. 668, 716 S.E.2d 772 (2011); Foster v. State, 314 Ga. App. 642, 725 S.E.2d 777 (2012); Taylor v. State, 319 Ga. App. 850, 738 S.E.2d 679 (2013); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

Lawful Discharge of Official Duties

Officer's act of clearing an area. — Using profanity, an arrestee challenged an officer's authority to clear an area (as the officer had been instructed by a judge), thus, the officer could arguably, if mistakenly, think probable cause existed for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) and qualified immunity entitled the officer to summary judgment on an illegal arrest claim. Spruell v. Harper, No. 1:09-CV-356-TWT, 2011 U.S. Dist. LEXIS 31492 (N.D. Ga. Mar. 25, 2011).

Knowledge

Defendant saw uniformed officer. — Evidence that the defendant and another were carrying stolen items toward a police officer's car and that they dropped the items and ran when they realized it was a police car, despite a uniformed officer shouting at them to stop, was sufficient to convict the defendant of burglary and obstruction of justice in violation of O.C.G.A. §§ 16-7-1(a) and 16-10-24(a). Mitchell v. State, 312 Ga. App. 293, 718 S.E.2d 126 (2011).

Application

Flight, or attempted flight, etc.

Defendant's probation was properly revoked for obstructing an officer in violation of O.C.G.A. § 16-10-24(a). The officers' detention of the defendant was a second-tier encounter because the officers had an articulable suspicion of criminal activity based on the defendant's matching the description and being in the area of an armed robbery; therefore, the defendant was not free to leave the encounter as the defendant did. Avery v. State, 313 Ga. App. 259, 721 S.E.2d 202 (2011).

Request for college police chief to interfere with district attorney investigation. — Public college's chief of police who objected to the college administration's directive that the chief of police speak with the district attorney about having the charges against a suspected laptop thief dropped reasonably believed that the chief was objecting to illegal conduct, obstruction of justice under O.C.G.A. § 16-10-24(a), and this was protected activity under O.C.G.A. § 45-1-4(d)(3) of the whistleblower statute. Albers v. Ga. Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 766 S.E.2d 520 (2014).

Eluding and hiding from police sufficient to support criminal trespass count. — Criminal trespass count of a defendant's indictment was sufficient because the indictment alleged that the defendant was attempting to elude and hide from a police officer when the defendant committed the trespass, which was a crime under O.C.G.A. § 16-10-24(a). Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

Hiding from police who had come to arrest defendant. — Evidence was sufficient for the jury to find the defendant guilty of misdemeanor hindering of an officer, O.C.G.A. § 16-10-24, based on the defendant's conduct of fleeing into the house and hiding in the attic when the police officers arrived; thus, the defendant hampered and delayed the police in the lawful execution of police duty. Martinez v. State, 322 Ga. App. 63, 743 S.E.2d 621 (2013).

Interference with a DUI investigation of another vehicle. — Evidence was sufficient to enable a jury to find that the defendant obstructed or hindered a law enforcement official in violation of O.C.G.A. § 16-10-24(a) when the defendant refused to obey commands to return to the defendant's vehicle while the officer was attempting to investigate a DUI in another vehicle containing a driver and three passengers. Kendrick v. State, 324 Ga. App. 45, 749 S.E.2d 45 (2013).

Probable cause shown to arrest.

When an initial stop was lawful and the defendant failed to stop when ordered to do so, there was probable cause to believe O.C.G.A. § 16-10-24(a) was violated and the defendant's apprehension and arrest did not violate the Fourth Amendment. United States v. Foskey, No. 10-15221, 2012 U.S. App. LEXIS 374 (11th Cir. Jan. 9, 2012), cert. denied, U.S. , 133 S. Ct. 460, 184 L. Ed. 2d 283 (2012) (Unpublished).

When a deputy arrested an arrestee for being drunk at a high school football game, the deputy was entitled to qualified immunity as to the arrestee's excessive force claim because, inter alia, probable

Application (Cont'd)

cause or arguable probable cause existed for the deputy to arrest the arrestee for obstructing a law enforcement officer under O.C.G.A. § 16-10-24(a) since the facts and circumstances would cause a prudent person to believe that the arrestee's negative responses to questions about drinking were intentional lies or, at least, constituted stubborn obstinance. Collins v. Ensley, No. 11-16077, 2012 U.S. App. LEXIS 24024 (11th Cir. Nov. 21, 2012) (Unpublished).

When officers arrested a defendant after responding to a report that a person resembling the subject of a "be on the lookout for" (BOLO) flyer had been in a bank, suppression was not warranted because when the defendant actively struggled with the officers, the officers acquired probable cause to arrest the defendant for obstruction under O.C.G.A. § 16-10-24. United States v. Akinlade, No. 11-15840, 2013 U.S. App. LEXIS 10270 (11th Cir. May 22, 2013) (Unpublished).

Sufficient evidence for conviction.

Evidence was sufficient to permit a rational trier of fact to find the defendant guilty of felony obstruction of a law enforcement officer in violation of O.C.G.A. § 16-10-24(b) because the defendant bit two officers and kicked one several times in the abdomen as the officers were attempting to arrest the defendant; so, the evidence clearly established that the defendant was "offering or doing violence" to the officers at the time of the obstruction. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Defendant's conviction for misdemeanor obstruction of a law enforcement officer, in violation of O.C.G.A. § 16-10-24(a), was supported by sufficient evidence as the defendant was advised by an officer that the defendant was under arrest, whereupon the defendant resisted the officer's handcuffing attempts, ran from the officer, and failed to comply with the directive to stop. Jenkins v. State, 310 Ga. App. 811, 714 S.E.2d 410 (2011).

Evidence that police responded to a home to investigate a crime after speaking to an injured man, that the officer saw the defendant standing with the defendant's hands concealed in a baggy jacket and instructed the defendant, whom the officer thought might be armed, to display the defendant's hands, and that the defendant failed to comply and attacked the officer supported the defendant's conviction for felony obstruction of an officer. Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884 (2011).

Evidence was sufficient for the jury to find defendant guilty of obstructing a police officer, in violation of O.C.G.A. § 16-10-24(a), because defendant impeded the officer in the discharge of the officer's duties, and the defendant hindered the officer not just by the defendant's arguments and obstinacy, but also by placing both defendant's and the officer's safety at risk by refusing to return to defendant's vehicle during a traffic stop. Timberlake v. State, 315 Ga. App. 693, 727 S.E.2d 516 (2012).

Evidence was sufficient to support the defendant's conviction for felony obstruction of an officer because the record showed that the defendant pushed the officer and that the officer suffered scratches on a hand and knee as a result. Arnold v. State, 315 Ga. App. 798, 728 S.E.2d 317 (2012).

Evidence was sufficient to support the defendant's conviction for obstruction of an officer as the officer testified that the officer was unable to complete the search of the defendant prior to the defendant's arrest because the defendant had been swinging at the officer's head and the officer needed to gain control of the situation; there was no indication that the officer was acting unlawfully. Brown v. State, 320 Ga. App. 12, 739 S.E.2d 32 (2013).

Defendant's conviction for obstruction was supported by evidence the defendant fled and thereby knowingly and wilfully hindered police officers in the lawful discharge of the officers' official duties. Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

Sufficient evidence supported the defendant's conviction for obstructing an officer based on the evidence that showed that the defendant failed to follow the officer's instructions in that the defendant refused to exit the truck when told to do so; the

defendant locked the door, rolled up the window and indicated calling 9-1-1; and, after the officers pulled the defendant out of the truck, the defendant struggled with the officers, refused to be handcuffed, and tried to get up from the ground. Taylor v. State, 326 Ga. App. 27, 755 S.E.2d 839 (2014).

Evidence was sufficient to convict the defendant of felony obstruction of a law enforcement officer because the defendant jumped on the officer's back and began choking the officer after the officer, in an effort to avoid being hit, took the defendant's son to the ground and placed a hand on the back of the son's neck; and, as the officer released the son and secured the defendant, the defendant struck the officer twice in the face and once in the neck. McMullen v. State, 325 Ga. App. 757, 754 S.E.2d 798 (2014).

Based on evidence that the defendant's conduct in hollering and cursing outside the house prevented an officer from continuing to photograph the scene and going inside to collect evidence and caused another officer to stop the officer's activities inside the house and come outside to assist, a rational trier of fact could have concluded that the defendant knowingly and willingly hindered the officer in the lawful charge of duties for purposes of a conviction for obstruction of an officer. Johnson v. State, 330 Ga. App. 75, 766 S.E.2d 533 (2014).

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and, when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Evidence insufficient to support conviction.

Evidence was not sufficient as to the obstruction count as there was no evidence that the officer commanded, rather than requested, that the defendant stop. The evidence established only that the officer asked the defendant to come over here to talk to the officer, which was not a command. Thomas v. State, 322 Ga. App. 734, 746 S.E.2d 216 (2013).

Probable cause not shown to arrest.

When the defendant refused to answer an officer's questions and instead exercised the right to walk away, the officer lacked probable cause to justify an arrest for obstruction, even after the defendant began running because the defendant had the right to avoid the first-tier police-citizen encounter. Ewumi v. State, 315 Ga. App. 656, 727 S.E.2d 257 (2012).

When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for obstructing an officer since the arrestee was within the arrestee's rights to hold the arrestee's arms stiffly because the officer did not have probable cause to arrest the arrestee for disorderly conduct. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013) (Unpublished).

Sentence not unconstitutional. — Defendant's sentence for obstruction of a law enforcement officer of 12 months confinement to be served on probation following 60 days of confinement, $1,500 in fines, 100 hours of community service, and a mental health evaluation was within the statutory limits set by O.C.G.A. §§ 16-10-24(b), 40-2-20(c), and 40-6-10(b), and did not shock the conscience. Smith v. State, 311 Ga. App. 184, 715 S.E.2d 434 (2011).

Potential to facilitate obstruction of officer justified enhanced sentence. — U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) enhancement was proper as the defendant concealed a gun in the defendant's pants during the police encounter, and attempted to reach for the

Application (Cont'd)

gun when the gun fell; the offense was "in connection with" another felony offense as the possession had a potential to facilitate obstruction of an officer with violence under O.C.G.A. § 16-10-24(b) when the defendant struggled with the officers over the vehicle. United States v. Linker, No. 12-12864, 2013 U.S. App. LEXIS 4014 (11th Cir. Feb. 27, 2013) (Unpublished).

Jury Instructions

Instruction on offering to do or doing violence.

In defendant's trial for felony obstruction of an officer, in violation of O.C.G.A. § 16-10-24, the state did not introduce evidence that the defendant did violence to the officer on the date in question other than by striking the officer with a motor vehicle and, as such, no due process violation occurred in the giving of the jury instructions because there was no reasonable probability that the jury convicted the defendant for obstructing the police officer in a manner not specified in the indictment. Fairwell v. State, 311 Ga. App. 834, 717 S.E.2d 332 (2011).

Instruction not authorized by evidence.

Trial court did not err in denying the defendant's request to charge the jury on misdemeanor obstruction as a lesser included offense of felony obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(b), because such a charge was not warranted by the evidence; the evidence plainly showed the completion of the greater offense, obstruction that involved "offering or doing violence" to an officer. White v. State, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Trial court did not err by rejecting the defendant's written request for a jury charge on misdemeanor obstruction of a law enforcement officer as a lesser included offense of felony obstruction because the evidence established that the defendant committed felony obstruction or no crime at all, thus, there was no evidentiary basis for the charge on the lesser included offense. Watson v. State, 328 Ga. App. 832, 763 S.E.2d 122 (2014).

Requested jury instruction not warranted.

Trial court did not err in refusing to charge the jury that "Something more than mere disagreement or remonstrance must be shown." The charge as a whole adequately covered the principle of law and allowed the defendant to argue that the defendant should have been acquitted because the state proved only disagreement or remonstrance. Kendrick v. State, 324 Ga. App. 45, 749 S.E.2d 45 (2013).

Requested jury instruction on an unlawful arrest claim incorrectly stated the law; a statement that a detainee was not required to respond to an officer's questions was contrary to Georgia law as failure to identify oneself could constitute obstruction. Williams v. Hudson, No. 14-12254, 2015 U.S. App. LEXIS 3785 (11th Cir. Mar. 11, 2015) (Unpublished).

Failure to instruct on lesser-included offense did not amount to ineffective assistance. — Because trial counsel made a reasonable decision to pursue an all-or-nothing defense strategy based on counsel's review of the evidence, the appellate court found no merit in the defendant's claim that trial counsel provided ineffective assistance due to failure to request a charge on misdemeanor obstruction as a lesser included offense of felony obstruction of an officer. Ingram v. State, 317 Ga. App. 606, 732 S.E.2d 456 (2012).

Charge on misdemeanor obstruction was not warranted.

Since the evidence showed completion of the greater offense of felony obstruction, the trial court did not err in failing to charge on misdemeanor obstruction as a lesser included offense. Carlson v. State, 329 Ga. App. 309, 764 S.E.2d 890 (2014).

Charge on entire section not error. — Defendant's trial counsel was not ineffective in failing to object to a jury charge on the entire obstruction code section, O.C.G.A. § 16-10-24, although there was no evidence that the defendant offered or threatened violence. The trial court instructed the jury to consider the evidence in light of the charges in the indictment. Williams v. State, 309 Ga. App. 688, 710 S.E.2d 884 (2011).

16-10-24.3. Obstructing or hindering persons making emergency telephone calls.

JUDICIAL DECISIONS

Evidence insufficient for conviction. — Evidence was insufficient to support defendant's conviction for hindering an emergency telephone call when the victim testified that when grabbing the cell phone which defendant broke in half, the victim was not thinking of calling or attempting to call 9-1-1, but was looking for something to throw. The victim's prior inconsistent statement about the phone was inadmissible hearsay due to lack of foundation and thus was not substantive evidence. Feagin v. State, 317 Ga. App. 543, 731 S.E.2d 778 (2012).

16-10-24.4. Obstructing or hindering park ranger.

(a) As used in this Code section, the term "park ranger" means any person, other than a law enforcement officer and other individuals covered under Code Section 16-10-24, however designated, who is employed by the state, any political subdivision of the state, or the United States for the enforcement of park rules and regulations.

(b) Except as otherwise provided in subsection (c) of this Code section, a person who knowingly and willfully obstructs or hinders any park ranger in the lawful discharge of his or her official duties shall be guilty of a misdemeanor.

(c) Whoever knowingly and willfully resists, obstructs, or opposes any park ranger in the lawful discharge of his or her official duties by offering or doing violence to the person of such park ranger shall be guilty of a felony and, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years. (Code 1981, § 16-10-24.4, enacted by Ga. L. 2013, p. 642, § 1/HB 126.)

Effective date. — This Code section became effective July 1, 2013.

16-10-25. Giving false name, address, or birthdate to law enforcement officer.

JUDICIAL DECISIONS

Offense involves dishonesty or false statement and admissible in child molestation trial. — Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

Evidence sufficient for conviction. Evidence that the defendant borrowed a sibling's car, struck the rear of a slower moving car leading to the deaths of the

driver and passenger, the defendant identified herself as the sibling, and the defendant signed the sibling's name on the Miranda form and on the defendant's written statement supported the defendant's convictions for first degree homicide by vehicle, forgery, reckless driving, and giving a false name. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153 (2012).

Evidence not sufficient for conviction. — Evidence was not sufficient to support the defendant's conviction for giving a false name to law enforcement despite the fact that the defendant's fingerprints were associated with one name, similar transaction evidence showed that the defendant was previously arrested under a second name, and the defendant gave neither name to the responding officer as the state did not show which was the defendant's true name and which name was false. Smith v. State, 322 Ga. App. 433, 745 S.E.2d 683 (2013).

Removal of alien for violations. — When an alien appealed denial of cancellation of removal, the alien's violation of O.C.G.A. § 16-10-25 was categorically a crime involving moral turpitude as it involved both dishonesty and the making of a false statement. Aderonke Aladesanmi v. United States AG, No. 13-11256, 2013 U.S. App. LEXIS 21358 (11th Cir. Oct. 22, 2013) (Unpublished).

Cited in Henley v. State, 317 Ga. App. 776, 732 S.E.2d 836 (2012); Manhertz v. State, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

16-10-31. Concealing death of another person.

JUDICIAL DECISIONS

Evidence sufficient to support conviction.

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Evidence insufficient for conviction. — Evidence was not sufficient to support the defendant's conviction for concealment as there was no proof that moving the adult victim to the sofa or turning off a night light in another room in any way concealed the adult victim's death or that killing the baby and preventing the baby from crying prevented the adult victim from being found sooner. Walker v. State, 296 Ga. 161, 766 S.E.2d 28 (2014).

Merger of counts as only one violation occurred. — Appellant's merger claims cannot simply be deemed waived on appeal following the entry of a guilty plea, even if the appellant fails to raise the issue, and four of the appellant's five convictions for concealing the death of the appellant's girlfriend merged since only one violation occurred. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Because all of the defendant's acts were intended to hinder a single discovery of the single unlawful killing of the defendant's girlfriend by concealing the girlfriend's death, two of the three convictions and sentences for concealing the death of another had to be vacated. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792 (2014).

16-10-32. Attempted murder or threatening of witnesses in official proceedings.

JUDICIAL DECISIONS

Threat of lawsuit insufficient. — Georgia Court of Appeals concludes that actually exercising one's right to file a lawsuit, conspiring with others to file a lawsuit, in and of itself, does not constitute a threat as required to support the crimes under O.C.G.A. §§ 16-10-93(a), 16-10-93(b)(1)(A), 16-10-32(b)(1), or 16-10-32(b)(4). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Evidence insufficient to support conviction. — During an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37(a). Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

16-10-33. Removal or attempted removal of weapon from public official; punishment.

(a) For the purposes of this Code section, the term "firearm" shall include stun guns and tasers. A stun gun or taser is any device that is powered by electrical charging units such as batteries and emits an electrical charge in excess of 20,000 volts or is otherwise capable of incapacitating a person by an electrical charge.

(b) It shall be unlawful for any person knowingly to remove or attempt to remove a firearm, chemical spray, or baton from the possession of another person if:

(1) The other person is lawfully acting within the course and scope of employment; and

(2) The person has knowledge or reason to know that the other person is employed as:

(A) A peace officer as defined in paragraph (8) of Code Section 35-8-2;

(B) An employee with the power of arrest by the Department of Corrections;

(C) An employee with the power of arrest by the State Board of Pardons and Paroles;

(D) A community supervision officer or other employee with the power of arrest by the Department of Community Supervision;

(E) A jail officer or guard by a county or municipality and has the responsibility of supervising inmates who are confined in a county or municipal jail or other detention facility; or

(F) A juvenile correctional officer by the Department of Juvenile Justice and has the primary responsibility for the supervision and control of youth confined in such department's programs and facilities.

(c) Any person who violates subsection (b) of this Code section shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years or a fine of not more than $10,000.00, or both.

(d) A violation of this Code section shall constitute a separate offense. A sentence imposed under this Code section may be imposed separately from and consecutive to or concurrent with a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-10-33, enacted by Ga. L. 2000, p. 1267, § 1; Ga. L. 2001, p. 4, § 16; Ga. L. 2011, p. 503, § 1/HB 123; Ga. L. 2015, p. 422, § 5-23/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted "An employee" for "A probation officer, or other employee" in subparagraph (b)(2)(B); substituted "An employee" for "A parole supervisor, or other employee" in subparagraph (b)(2)(C); added subparagraph (b)(2)(D); and redesignated former subparagraphs (b)(2)(D) and (b)(2)(E) as present subparagraphs (b)(2)(E) and (b)(2)(F), respectively. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

16-10-34. Use of laser devices against law enforcement officer.

(a) For purposes of this Code section, the term "laser device" means a device designed to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object. Such term also means a device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or other means or that emits light which simulates the appearance of a beam of light.

(b) It shall be unlawful for any person to knowingly and intentionally project upon a law enforcement officer any laser device without such officer's permission if:

(1) The law enforcement officer is lawfully acting within the course and scope of employment; and

(2) The person has knowledge or reason to know that the law enforcement officer is employed as:

(A) A peace officer as defined in paragraph (8) of Code Section 35-8-2;

(B) An employee with the power of arrest by the Department of Corrections;

(C) An employee with the power of arrest by the State Board of Pardons and Paroles;

(D) A community supervision officer or other employee with the power of arrest by the Department of Community Supervision;

(E) A jail officer or guard by a county or municipality and has the responsibility of supervising inmates who are confined in a county or municipal jail or other detention facility; or

(F) A juvenile correctional officer or juvenile probation officer by the Department of Juvenile Justice and has the primary responsibility for the supervision and control of youth confined in such department's programs and facilities.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a high and aggravated misdemeanor.

(d) It shall not be a defense to a prosecution for a violation of this Code section that the laser device was pointed at such officer through a glass, window, or other transparent or translucent object.

(e) Each violation of this Code section shall constitute a separate offense. A sentence imposed under this Code section may be imposed separately from and consecutive to or concurrent with a sentence for any other offense related to the act or acts establishing the offense under this Code section. (Code 1981, § 16-10-34, enacted by Ga. L. 2012, p. 1142, § 1/SB 441; Ga. L. 2015, p. 422, § 5-24/HB 310.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

The 2015 amendment, effective July 1, 2015, substituted "An employee" for "A probation officer, or other employee" in subparagraph (b)(2)(B); substituted "An employee" for "A parole supervisor, or other employee" in subparagraph (b)(2)(C); added new subparagraph (b)(2)(D); redesignated former subparagraphs (b)(2)(D) and (b)(2)(E) as present subparagraphs (b)(2)(E) and (b)(2)(F), respectively; and inserted "or juvenile probation officer" in subparagraph (b)(2)(F). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 16-10-34 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

ARTICLE 3

ESCAPE AND OTHER OFFENSES RELATED TO CONFINEMENT

16-10-50. Hindering apprehension or punishment of criminal.

JUDICIAL DECISIONS

An accessory after the fact cannot be an accomplice to the major crime. Defendant's conviction for hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 had to be set aside because defendant could not be convicted for both malice murder and hindering the apprehension of a criminal, which was the equivalent of the common law crime of being an accessory after the fact; a party cannot be convicted both of being a principal to the crime and an accessory after the fact. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

Requested instruction not necessary. — In the defendant's trial on a charge of armed robbery, in violation of O.C.G.A. § 16-8-41, the trial court did not err in failing to provide the jury with a requested instruction on hindering the apprehension of a criminal as a lesser included offense pursuant to O.C.G.A. § 16-10-50 as the hindering offense was the equivalent of being an accessory after the fact; moreover, it was not a lesser included offense of the principal crime, but a separate offense. Windhom v. State, 315 Ga. App. 855, 729 S.E.2d 25 (2012).

16-10-51. Bail jumping.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-10-52. Escape.

(a) A person commits the offense of escape when he or she:

(1) Having been convicted of a felony or misdemeanor or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement;

(2) Being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement;

(3) Having been adjudicated of a delinquent act or a juvenile traffic offense, or as a child in need of services subject to lawful custody or lawful confinement, intentionally escapes from lawful custody or from any place of lawful confinement;

(4) Being in lawful custody or lawful confinement prior to adjudication, intentionally escapes from such custody or confinement; or

(5) Intentionally fails to return as instructed to lawful custody or lawful confinement or to any residential facility operated by the Georgia Department of Corrections after having been released on the condition that he or she will so return; provided, however, such

person shall be allowed a grace period of eight hours from the exact time specified for return if such person can prove he or she did not intentionally fail to return.

(a.1) Revocation of probation for conduct in violation of any provision of subsection (a) of this Code section shall not preclude an independent criminal prosecution under this Code section based on the same conduct.

(b)(1) A person who, having been convicted of a felony, is convicted of the offense of escape shall be punished by imprisonment for not less than one nor more than ten years.

(2) Any person charged with a felony who is in lawful confinement prior to conviction or adjudication who is convicted of the offense of escape shall be punished by imprisonment for not less than one nor more than five years.

(3) Notwithstanding paragraphs (1) and (2) of this subsection, a person who commits the offense of escape while armed with a dangerous weapon shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than 20 years.

(4) Any other person convicted of the offense of escape shall be punished as for a misdemeanor. (Laws 1833, Cobb's 1851 Digest, p. 807; Code 1863, § 4378; Code 1868, § 4416; Code 1873, § 4484; Ga. L. 1876, p. 112, § 1; Ga. L. 1882-83, p. 48, § 1; Code 1882, §§ 4483a, 4484; Ga. L. 1884-85, p. 52, § 1; Penal Code 1895, §§ 314, 316; Penal Code 1910, §§ 319, 321; Code 1933, §§ 26-4507, 26-4509; Ga. L. 1953, Nov.-Dec. Sess., p. 187, § 1; Ga. L. 1955, p. 578, § 1; Ga. L. 1961, p. 491, § 1; Code 1933, § 26-2501, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1983, p. 645, § 1; Ga. L. 1989, p. 329, § 1; Ga. L. 1994, p. 852, § 1; Ga. L. 1997, p. 1064, § 10; Ga. L. 2001, p. 94, § 2; Ga. L. 2013, p. 294, § 4-8/HB 242.)

The 2013 amendment, effective January 1, 2014, in paragraph (a)(3), deleted "or unruly" following "delinquent" and inserted "or as a child in need of services subject to lawful custody or lawful confinement,". See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INDICTMENT AND ACCUSATION
APPLICATION

General Consideration

Cited in Williams v. Morahan, No. 13-10303, 2013 U.S. App. LEXIS 18837 (11th Cir. Sept. 11, 2013) (Unpublished).

Indictment and Accusation

No fatal variance between indictment and proof. — There was no fatal variance between an indictment for felony escape and the proof at trial. The allegation that the defendant was in custody for theft by taking was mere surplusage; the defendant's lawful confinement was both alleged and proven without regard to the theft allegation. Juhan v. State, 322 Ga. App. 620, 744 S.E.2d 910 (2013).

Application

Defendant in house arrest program is in lawful custody or confinement. — Defendant participating in an electronically-monitored house arrest program is in lawful custody or lawful confinement, as provided in O.C.G.A. § 16-10-52, because the General Assembly explicitly recognized a defendant's home as a place where he or she could be kept within bounds or restricted in movement for purposes of the electronic pretrial release program. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

Evidence sufficient.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty of escape beyond a reasonable doubt because the defendant was in a state of being restricted to or detained within the defendant's home, under the guard of an electronic monitor, and the defendant violated the conditions of the house arrest order by removing the monitor and leaving town. Brown v. State, 314 Ga. App. 1, 723 S.E.2d 112 (2012).

16-10-56. Riot in a penal institution.

JUDICIAL DECISIONS

Application with O.C.G.A. § 16-10-24. — Defendant's act of swinging the defendant's fist at the deputy satisfied the elements of both riot in a penal institution under O.C.G.A. § 16-10-56(a), and obstruction of a law enforcement officer by offering violence under O.C.G.A. § 16-10-24(b), and because the two defined crimes did not address the same criminal conduct, there was no ambiguity created by different punishments being set forth for the same crime and the rule of lenity did not apply. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015).

No fatal variance. — There was not a fatal variance between the indictment and the proof at trial because there was some evidence that the defendant used the defendant's arms, not just the defendant's legs, to apply the chokehold to the victim. Strapp v. State, 326 Ga. App. 264, 756 S.E.2d 333 (2014).

Sufficient evidence for conviction.

Evidence that the defendant swung a fist at an officer was sufficient to sustain a conviction for riot in a penal institution for committing an act in a violent manner. Chynoweth v. State, 331 Ga. App. 123, 768 S.E.2d 536 (2015).

Defendant not entitled to requested instructions. — Defendant was not entitled to jury instructions on simple battery, misdemeanor obstruction of an officer, or justification, as a lesser offense of riot, as simple battery required an unlawful touching and obstruction precluded a violent act, while riot required a violent act, and there was no evidence to support an instruction on justification as the defendant did not admit using violence against

the victim. Strapp v. State, 326 Ga. App. 264, 756 S.E.2d 333 (2014).

ARTICLE 4

PERJURY AND RELATED OFFENSES

16-10-70. Perjury.

JUDICIAL DECISIONS

Analysis

General Consideration
Materiality

General Consideration

Cited in State v. Lampl, 296 Ga. 892, 770 S.E.2d 629 (2015).

Materiality

False statement was material. — In a prosecution for perjury under O.C.G.A. § 16-10-70, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the defendant's false statement given in the defendant's trial on a charge of running a red light about the location of the officer's patrol car was material as the defendant's false statement went to the issue of whether the officer could have observed the alleged red light violation and, thus, whether the officer's testimony was credible. As such, the defendant's testimony clearly could have influenced the jury's decision over whether the defendant actually ran the red light. Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012).

16-10-71. False swearing.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Sentence affirmed because the offense constituted a felony. — Defendant was not entitled to relief from defendant's sentence for false swearing, in violation of O.C.G.A. § 21-2-565, because the rule of lenity did not apply in that there was no uncertainty as to the applicable sentence for the crime, and the imposition of a five-year sentence was appropriate and within the sentencing range, under O.C.G.A. § 16-10-71, for the offense, which constituted a felony under O.C.G.A. § 16-1-3. Hogan v. State, 316 Ga. App. 708, 730 S.E.2d 178 (2012).

False affidavits sufficient to support conviction for false swearing even though no oath administered. — Although no one administered an oath to the defendant prior to the defendant's execution of affidavits at a real estate closing, the affidavits recited that the defendant was duly sworn and that the defendant "on oath deposes and says" the facts stated in the affidavit. The false affidavits were therefore sufficient to support the defendant's conviction for false swearing under O.C.G.A. § 16-10-71(a). Finch v. State, 326 Ga. App. 141, 756 S.E.2d 265 (2014).

16-10-72. Subornation of perjury or false swearing.

JUDICIAL DECISIONS

Cited in Hill v. State, 315 Ga. App. 833, 729 S.E.2d 1 (2012).

ARTICLE 5

OFFENSES RELATED TO JUDICIAL AND OTHER PROCEEDINGS

16-10-93. Influencing witnesses.

JUDICIAL DECISIONS

No abuse of discretion in refusing to sever charges. — Trial court did not abuse its discretion by refusing to sever defendant's drug charges from his trial on a charge of influencing a witness because evidence of either crime would have been admissible at the trial of the other and the charged offenses were neither so numerous nor so complex that the jury was unable to parse the evidence and correctly apply the law with regard to each charge. Perry v. State, 317 Ga. App. 885, 733 S.E.2d 57 (2012).

Evidence sufficient to support conviction. — Trial court did not err in finding that the defendant was guilty beyond a reasonable doubt of influencing a witness because the state presented sufficient evidence that the defendant acted with the requisite criminal intent to deter the victim from testifying and that the defendant directly communicated a threat to the victim; pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the trial court was entitled to rely on the victim's testimony that the defendant threatened to kill the victim if the victim testified against the defendant. Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14 (2012).

Threatening to file lawsuit not within ambit of statute. — Defendant was improperly convicted of influencing witnesses in violation of O.C.G.A. § 16-10-93(a) because the mere threat of potential monetary damage and public humiliation were inextricably intertwined with the defendant's threat of a lawsuit, which was not a per se threat to person nor to property; threatening to (ostensibly) exercise one's legitimate right to file a lawsuit is not encompassed by this statute. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Threat of lawsuit insufficient. — Georgia Court of Appeals concludes that actually exercising one's right to file a lawsuit, conspiring with others to file a lawsuit, in and of itself, does not constitute a threat as required to support the crimes under O.C.G.A. §§ 16-10-93(a), 16-10-93(b)(1)(A), 16-10-32(b)(1), or 16-10-32(b)(4). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

Trial court erred by denying the defendant's demurrer to two counts in a second indictment, which charged the defendant with the offense of influencing witnesses under O.C.G.A. § 16-10-93(a) with the intent to influence, delay, or prevent the witnesses' testimony in an official proceeding because actually exercising one's right to file a lawsuit, which was alleged in the case, did not constitute a threat as required to support the crimes under § 16-10-93(a). Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013).

16-10-94. Tampering with evidence.

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Evidence sufficient to sustain conviction.

Evidence that baggies containing what appeared to be marijuana residue were found in the dishwasher supported the defendant's conviction for tampering with evidence. Kirchner v. State, 322 Ga. App. 275, 744 S.E.2d 802 (2013).

Convictions for malice murder, felony murder, aggravated assault with a deadly weapon, tampering with evidence, and two counts of cruelty to children in the third degree were supported by evidence that, while two of the victim's children were in a closet, the defendant shot the victim and told the children the victim shot herself; the testimony of the medical examiner that it was not possible for the victim to have self-inflicted the type of wound the victim sustained, which appeared to have been inflicted from two feet away; the defendant's statement to police that the defendant threw the gun in the woods; and testimony that the defendant made the children help the defendant put the victim in the car to go to the hospital. Durden v. State, 293 Ga. 89, 744 S.E.2d 9 (2013).

Defendant's admission that the defendant helped the defendant's son hold down the victim as the son penetrated the victim, that the defendant rubbed the defendant's own penis against the victim and ejaculated on the victim, that the defendant put the defendant's hands over the son's as the son choked the victim, that the defendant helped dump the victim's body, and the testimony of the defendant's wife that the defendant helped undress the victim, the defendant put the defendant's mouth on the victim's penis, and the defendant attempted to put the defendant's penis in the victim's anus was sufficient to support defendant's convictions for murder, false imprisonment, two counts of aggravated child molestation, child molestation, cruelty to children in the first degree, concealing the death of another, and tampering with evidence. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

Evidence that the defendant found a bullet shell casing in the bedroom where the victim was shot and that, during a trash pull, a spent casing was found inside a soft drink can that had been cut in half belied the defendant's claim that the defendant did not realize the importance of the casing and supported a conviction for tampering with evidence. Thornton v. State, 331 Ga. App. 191, 770 S.E.2d 279 (2015).

Evidence insufficient to sustain conviction.

Evidence was not sufficient to support the defendant's conviction for tampering with evidence with intent to prevent the apprehension and obstruct the prosecution of another person in violation of O.C.G.A. § 16-10-94 because the evidence did not prove beyond a reasonable doubt that the defendant created and posted a video with the specific intent to prevent the apprehension or obstruct the prosecution of some other person. Haley v. State, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

There was not sufficient evidence to support the tampering with evidence conviction as there was no evidence to show the substance in the defendant's mouth, that was destroyed, was marijuana. King v. State, 317 Ga. App. 834, 733 S.E.2d 21 (2012).

Felony sentence vacated. — Defendant's felony sentence for tampering with evidence in violation of O.C.G.A. § 16-10-94 was vacated and the case was remanded for misdemeanor sentencing because the verdict form simply contained a finding of guilty on the tampering count, making it impossible to determine if the jury found the defendant guilty of misde-

meanor or felony tampering; the defendant had to be given the benefit of the doubt in construing the ambiguous verdict. Hampton v. State, 289 Ga. 621, 713 S.E.2d 851 (2011).

Indictment accused the defendant and an alleged accomplice of tampering with evidence with the intent to prevent the apprehension of each of the accused; however, because "each said accused" could mean either of the accused, and the verdict form and the jury charge did not require any further specificity, the jury could have found the defendant guilty of tampering to prevent the defendant's own apprehension (a misdemeanor) or the apprehension of the alleged accomplice (a felony); thus, the defendant had to be given the benefit of the doubt in construing the ambiguous verdict, and the defendant's felony tampering sentence was vacated. Haynes v. State, 331 Ga. App. 104, 769 S.E.2d 801 (2015).

Crime was misdemeanor because tampering involved defendant's own case.

Because the defendant tampered with evidence in the defendant's own case by throwing the murder weapon away, the defendant could only be convicted of a misdemeanor; therefore, the trial court erred in finding the defendant guilty of a felony. DeLeon v. State, 289 Ga. 782, 716 S.E.2d 173 (2011).

16-10-97. Intimidation or injury of any officer in or of any court.

(a) A person who by threat or force or by any threatening action, letter, or communication:

(1) Endeavors to intimidate or impede any grand juror or trial juror or any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court while in the discharge of such juror's or officer's duties;

(2) Injures any grand juror or trial juror in his or her person or property on account of any indictment or verdict assented to by him or her or on account of his or her being or having been such juror; or

(3) Injures any officer in or of any court of this state or any court of any county or municipality of this state or any officer who may be serving at any proceeding in any such court in his or her person or property on account of the performance of his or her official duties

shall, upon conviction thereof, be punished by a fine of not more than $5,000.00 or by imprisonment for not more than 20 years, or both.

(b) As used in this Code section, the term "any officer in or of any court" means a judge, attorney, clerk of court, deputy clerk of court, court reporter, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42.

(c) A person who by threat or force or by any threatening action, letter, or communication endeavors to intimidate any law enforcement officer, outside the scope and course of his or her employment, or his or her immediate family member in retaliation or response to the discharge of such officer's official duties shall be guilty of a felony and,

upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $5,000.00, or both. (Code 1981, § 16-10-97, enacted by Ga. L. 1988, p. 391, § 1; Ga. L. 1989, p. 14, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2010, p. 999, § 2/HB 1002; Ga. L. 2011, p. 59, § 1-63/HB 415; Ga. L. 2012, p. 623, § 1/HB 541; Ga. L. 2015, p. 422, § 5-25/HB 310.)

The 2012 amendment, effective July 1, 2012, in subsection (a), inserted "action" and added a comma following "letter"; and added subsection (c).

The 2015 amendment, effective July 1, 2015, substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, or probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "or probation officer" at the end of subsection (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

CHAPTER 11

OFFENSES AGAINST PUBLIC ORDER AND SAFETY

Article 1

Treason and Other Subversive Activities

Part 2

Sedition and Subversive Activities

Sec.
16-11-7. Special assistant attorney general for investigation and prosecution of subversive activities.
16-11-10. Grand jury investigations.
16-11-11. Dissolution of subversive organizations; revocation of charter, funds, books, and records.

Article 2

Offenses Against Public Order

16-11-37. Terroristic threats and acts; penalties.
16-11-39.1. Harassing communications; venue; separate offenses; impact on free speech.
16-11-40. Criminal defamation [Repealed].
16-11-40.1. Definitions; identification of minors; criminal offense.
Sec.
16-11-45. Use of laser against aircraft.

Article 3

Invasions of Privacy

Part 1

Wiretapping, Eavesdropping, Surveillance, and Related Offenses

16-11-60. Definitions.
16-11-62. Eavesdropping, surveillance, or intercepting communication which invades privacy of another; divulging private message.
16-11-64. Interception of wire or oral transmissions by law enforcement officers.
16-11-64.1. Application and issuance of order authorizing installation and use of pen register or trap and trace device.

Part 3

Invasion of Privacy

16-11-90. Prohibition on nude or sexually explicit electronic transmissions.

Article 4

Dangerous Instrumentalities and Practices

Part 1

General Provisions

Sec.

16-11-101.1. Furnishing pistol or revolver to person under the age of 18 years.

16-11-103. Discharge of gun or pistol near public highway; penalty.

16-11-107. Harming a law enforcement animal.

Part 3

Carrying and Possession of Firearms

16-11-126. Having or carrying handguns, long guns, or other weapons; license requirement; exceptions for homes, motor vehicles, private property, and other locations and conditions.

16-11-127. Carrying weapons in unauthorized locations.

16-11-127.1. Carrying weapons within school safety zones, at school functions, or on a bus or other transportation furnished by a school.

16-11-127.2. Weapons on premises of nuclear power facility.

16-11-129. Weapons carry license; temporary renewal permit; mandamus; verification of license.

16-11-130. Exemptions from Code Sections 16-11-126 through 16-11-127.2.

16-11-130.1. Allowing personnel to carry weapons within certain school safety zones and at school functions.

16-11-130.2. Carrying a weapon or long gun at a commercial service airport.

16-11-131. Possession of firearms by convicted felons and first offender probationers.

16-11-132. Possession of handgun by person under the age of 18 years.

16-11-133. Minimum periods of confinement for persons convicted who have prior convictions.

16-11-135. Public or private employer's parking lots; right of privacy in vehicles in employer's parking lot or invited guests on lot; severability; rights of action.

16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.

16-11-137. Required possession of weapons carry license or proof of exemption when carrying a weapon; detention for investigation of carrying permit.

16-11-138. Defense of self or others as absolute defense.

Part 4A

Enhanced Criminal Penalties

16-11-160. Use of machine guns, sawed-off rifles, sawed-off shotguns, or firearms with silencers during commission of certain offenses; enhanced criminal penalties.

Part 5

Brady Law Regulations

16-11-171. Definitions.

16-11-173. Legislative findings; preemption of local regulation and lawsuits; exceptions.

ARTICLE 1

TREASON AND OTHER SUBVERSIVE ACTIVITIES

16-11-2. Insurrection.

Cross references. — Mutiny and sedition by persons subject to Georgia Code of Military Justice, § 38-2-1094.

PART 2

SEDITION AND SUBVERSIVE ACTIVITIES

16-11-7. Special assistant attorney general for investigation and prosecution of subversive activities.

The Governor, with the concurrence of the Attorney General, is authorized and directed to appoint a special assistant attorney general for investigating and prosecuting subversive activities, whose responsibility it shall be, under the supervision of the Attorney General, to assemble, arrange, and deliver to the district attorney of any county, together with a list of necessary witnesses for presentation to the next grand jury in the county, all information and evidence of matters within the county which have come to his or her attention relating in any manner to the acts prohibited by this part and relating generally to the purpose, processes, and activities of subversive organizations, associations, groups, or persons. Such evidence may be presented by the Attorney General or the special assistant attorney general to the grand jury of any county directly, and he or she may represent the state on the trial of such a case, should he or she feel the ends of justice would be best served thereby, and the special assistant attorney general may testify before any grand jury as to matters referred to in this part as to which he or she may have information. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 6; Ga. L. 1953, Nov.-Dec. Sess., p. 73, § 3; Ga. L. 2015, p. 385, § 5-1/HB 252.)

The 2015 amendment, effective July 1, 2015, in the first sentence, inserted "or her" near the middle and deleted "communists and any other or related" preceding "subversive organizations" near the end; and, in the last sentence, inserted "or she" three times, and deleted "herein provided" preceding "may testify".

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

16-11-10. Grand jury investigations.

The judge of any court exercising general criminal jurisdiction, when in his or her discretion it appears appropriate or when informed by the Attorney General or district attorney that there is information or evidence of the character described in Code Section 16-11-7 to be considered by the grand jury, shall charge the grand jury to inquire into violations of this part for the purpose of proper action and further to inquire generally into the purposes, processes, and activities, and any other matters affecting subversive organizations, associations, groups, or persons. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 9; Ga. L. 2015, p. 385, § 5-2/HB 252.)

The 2015 amendment, effective July 1, 2015, inserted "or her" near the beginning and deleted "communists or any related or other" preceding "subversive organizations" near the end.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

16-11-11. Dissolution of subversive organizations; revocation of charter, funds, books, and records.

It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in this state. Any organization which by a court of competent jurisdiction is found to have violated this Code section shall be dissolved and, if it is a corporation organized and existing under the laws of this state, a finding by a court of competent jurisdiction that it has violated this Code section shall constitute legal cause for revocation of its charter and its charter shall be revoked. All funds, books, records, and files of every kind and all other property of any organization found to have violated this Code section shall be seized by and for this state, the funds to be deposited in the state treasury and the books, records, files, and other property to be turned over to the Attorney General. (Ga. L. 1953, Jan.-Feb. Sess., p. 216, § 5; Ga. L. 2015, p. 693, § 2-11/HB 233.)

The 2015 amendment, effective July 1, 2015, in the second sentence, substituted "revocation" for "forfeiture" and substituted "revoked" for "forfeited" near the end. See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

ARTICLE 2

OFFENSES AGAINST PUBLIC ORDER

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

16-11-30. Riot.

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

16-11-32. Affray.

JUDICIAL DECISIONS

Jail is not a public place. — Defendant's conviction for affray in violation of O.C.G.A. § 16-11-32 was reversed because the altercation occurred in the Hall County Jail, which was not a "public place" as required for conviction pursuant to O.C.G.A. §§ 16-1-3(15) and 16-6-8(d). Singletary v. State, 310 Ga. App. 570, 713 S.E.2d 698 (2011).

16-11-34.1. Preventing or disrupting General Assembly sessions or other meetings of members; unlawful activities within the state capitol or certain Capitol Square buildings.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-36. Loitering or prowling.

JUDICIAL DECISIONS

Evidence of flight. — Flight is circumstantial evidence of consciousness of guilt, and the weight to be given to such evidence is for the jury to decide. St. Louis v. State, 328 Ga. App. 837, 763 S.E.2d 126 (2014).

Attempt to enter an automobile did not merge with loitering. — Merging of sentences for attempt to enter an automobile in violation of O.C.G.A. §§ 16-4-1 and 16-8-18, and loitering under O.C.G.A. § 16-11-36 was not warranted because loitering required proof of presence in a place at a time or in a manner not usual for law-abiding individuals, and attempt to enter an automobile required performance of an act which constituted a substantial step toward the commission of entering an automobile, both elements not required by the other crime. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Evidence supports conviction, etc. Conviction for loitering under O.C.G.A. § 16-11-36 was upheld based on the defendant, a male, being present in a sorority house parking lot at 2:00 a.m. repeatedly pulling on a vehicle's door handle. Brown v. State, 312 Ga. App. 489, 718 S.E.2d 847 (2011).

Trial court did not err by denying the defendant's motion for a new trial because

a rational jury was entitled to find the defendant guilty of loitering or prowling based on the evidence and all inferences drawn from the evidence that the defendant was found outside the victim's apartment door at 6:45 a.m., in the dark, with items in the defendant's pocket that could be used for a burglary and fled when confronted; the fact that the defendant identified oneself to the police officer did not mean the evidence was insufficient. St. Louis v. State, 328 Ga. App. 837, 763 S.E.2d 126 (2014).

Cited in Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

16-11-37. Terroristic threats and acts; penalties.

(a) A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

(b) A person commits the offense of a terroristic act when:

(1) He or she uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another's household;

(2) While not in the commission of a lawful act, he or she shoots at or throws an object at a conveyance which is being operated or which is occupied by passengers; or

(3) He or she releases any hazardous substance or any simulated hazardous substance under the guise of a hazardous substance for the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience.

(c) A person convicted of the offense of a terroristic threat shall be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both. A person convicted of the offense of a terroristic act shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than ten years, or both; provided, however, that if any person suffers a serious physical injury as a direct result of an act giving rise to a conviction under this Code section, the person so convicted shall be punished by a fine of not more than $250,000.00 or imprisonment for not less than five nor more than 40 years, or both.

(d) A person who commits or attempts to commit a terroristic threat or act with the intent to retaliate against any person for:

(1) Attending a judicial or administrative proceeding as a witness, attorney, judge, clerk of court, deputy clerk of court, court reporter, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, or party or producing any record, document, or other object in a judicial or official proceeding; or

(2) Providing to a law enforcement officer, community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42, prosecuting attorney, or judge any information relating to the commission or possible commission of an offense under the laws of this state or of the United States or a violation of conditions of bail, pretrial release, probation, or parole

shall be guilty of the offense of a terroristic threat or act and, upon conviction thereof, shall be punished, for a terroristic threat, by imprisonment for not less than five nor more than ten years or by a fine of not less than $50,000.00, or both, and, for a terroristic act, by imprisonment for not less than five nor more than 20 years or by a fine of not less than $100,000.00, or both. (Ga. L. 1884-85, p. 131, § 1; Ga. L. 1892, p. 108, § 1; Ga. L. 1893, p. 130, § 1; Penal Code 1895, §§ 511, 512, 730; Ga. L. 1905, p. 86, § 1; Penal Code 1910, §§ 512, 513, 782; Code 1933, §§ 26-1803, 26-7308, 26-7309; Code 1933, § 26-1307, enacted by Ga. L. 1968, p. 1249, § 1; Code 1933, § 26-1307.1, enacted by Ga. L. 1974, p. 1022, § 1; Ga. L. 1998, p. 270, § 6; Ga. L. 2002, p. 1094, § 4; Ga. L. 2010, p. 999, § 3/HB 1002; Ga. L. 2015, p. 422, § 5-26/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "probation officer" in paragraph (d)(1); and substituted "community supervision officer, county or Department of Juvenile Justice juvenile probation officer, probation officer serving pursuant to Article 6 of Chapter 8 of Title 42" for "adult or juvenile probation officer" in paragraph (d)(2). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Analysis

General Consideration
Corroboration

General Consideration

Sufficient evidence of intent.

Defendant was properly convicted of terroristic threats in violation of O.C.G.A. § 16-11-37(a) because the jury was presented with sufficient evidence by which to find that the defendant intended to terrorize officers by communicating a threat to blow up the defendant's home using propane; although there was testimony that the defendant suffered from a history of mental illness, the defendant did not plead the affirmative defense of insanity, and the issue of the defendant's criminal intent was a question of fact for the jury, which was presented with sufficient evidence to establish the requisite criminal intent. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Evidence sufficient for conviction.

Defendant's specific and repeat threats to shoot any electric company technicians who ventured onto the defendant's property and the defendant's repeated demands that the defendant's threats be noted in the defendant's account records supported the defendant's convictions for terroristic threats in violation of O.C.G.A. § 16-11-37(a). Nassau v. State, 311 Ga. App. 438, 715 S.E.2d 837 (2011).

Any rational trier of fact could find the defendant guilty beyond a reasonable doubt of terroristic threats, O.C.G.A. § 16-11-37(a), hoax devices, O.C.G.A. § 16-7-85(a), and armed robbery, O.C.G.A. § 16-8-41(a), because although circumstantial, the evidence authorized the jury to exclude every reasonable hypothesis other than that the defendant engaged in the acts that constituted the crimes; even though the defendant was apprehended while wearing clothing that did not match that described by the victims, an officer familiar with the habits of bank robbers testified that bank robbers like to wear multi-layer clothing and then shed clothes after the crime. Williams v. State, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Defendant's conviction for making a terroristic threat was affirmed because evidence showed that the defendant, after an enraged and profane confrontation, angrily returned to the scene to tell the victim that he was a "dead man." This authorized the jury to conclude that the defendant was threatening to kill the victim, which would meet the definition of a terroristic threat. Enuka v. State, 314 Ga. App. 466, 724 S.E.2d 471 (2012).

Evidence was sufficient to convict the defendant of terroristic threats, six counts of aggravated assault, and possession of a firearm during the commission of a felony because a witness testified that a vehicle fitting the description of the defendant's car was driven by the shooter who shot at the house of the complainant's mother where the complainant was staying; multiple gunshot holes were found in the side of the home; the complainant testified that, earlier that morning, the defendant had threatened to come to the house and kill the complainant; and the complainant received text messages from the defendant later that morning apologizing for what had happened. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Trial court properly convicted the defendant of making a terroristic threat based on the evidence adduced at trial that established that the defendant's purpose in returning to a hair salon after a request for check cashing was rebuffed, loudly cursing the victims, and threatening to force the victims to the floor and shoot the victims was to terrorize the victims. Smith v. State, 319 Ga. App. 640, 738 S.E.2d 95 (2013).

Defendant's threats to kill both victims supported the terroristic threats convictions. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Defendant's repeated declarations that the defendant wished a detective and the detective's family to suffer, combined with the defendant's statement that the defendant was likely to be released from jail soon, was sufficient for the jury to infer that the defendant intended the defendant's statements to threaten violence against the detective and the detective's family in violation of O.C.G.A. § 16-11-37, although the defendant was presently in custody and unable to deliver on the threats, and although the detective laughed at the defendant. Edwards v. State, 330 Ga. App. 732, 769 S.E.2d 150 (2015).

Threats made for purpose of mental health evaluation insufficient. — Dur-

ing an intake interview at a mental health evaluation facility, a defendant's threats regarding the defendant's sentencing judge were made for the purpose of diagnosis and treatment of mental health issues, not with the purpose of terrorizing the judge or intimidating the judge from attending legal proceedings as required for finding terroristic threats in violation of O.C.G.A. §§ 16-10-32(b) and 16-11-37(a). Koldewey v. State, 310 Ga. App. 788, 714 S.E.2d 371 (2011), cert. denied, 2012 Ga. LEXIS 239 (Ga. 2012).

Jury instructions.

Although the trial court erred in instructing the jury on crime of terroristic threats, the error was harmless because there was no reasonable possibility that the defendant was convicted for committing terroristic threats in a manner not averred by the indictment, and the trial court gave complete instructions to the jury during the course of the one-day trial, albeit not in the sequence required by O.C.G.A. § 5-5-24(b); the charge, although not consistent with the indictment, did not reasonably present the jury with an alternate basis for finding the defendant guilty of terroristic threats. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Defendant waived the objection to the trial court's decision to recharge the jury on the elements of terroristic threats because the defendant did not object when the trial court announced the proposed recharge and asked for any objections before instructing the jury. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Trial court's failure to recharge on corroboration was not plain error under O.C.G.A. § 17-8-58(b) or substantial error that was harmful as a matter of law under O.C.G.A. § 5-5-24(c) because in the court's instructions to the jury following closing argument, the trial court properly charged the jury that no person would be convicted of terroristic threats on the unsupported testimony of the party to whom the threat was made. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Corroboration

Threat to kill sufficiently corroborated.

With regard to the defendant's challenge to the sufficiency of the evidence supporting the defendant's conviction for terroristic threats, evidence of injury to the victim's arm that appeared to be a gunshot, blood on the victim's front porch, and witness testimony that the witness heard a gunshot and a woman say that the victim was shot was sufficient corroboration of the defendant's threat to kill the victim. Lomax v. State, 319 Ga. App. 693, 738 S.E.2d 152 (2013).

Evidence sufficient for corroboration.

Any rational trier of fact could have found the defendant guilty of the crime of terroristic threats beyond a reasonable doubt because the victim's testimony was corroborated by independent evidence of the injury to the victim's face and by an officer's testimony that when the officer arrived at the scene the officer saw that the victim was shaking, looked like the victim had been crying, and was scared. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

Victim's testimony regarding a defendant's terroristic threat to kill the victim by dropping a hair dryer into a filled bathtub with the victim, then forcing the victim to eat the defendant's feces was sufficiently corroborated by evidence of the events before and after the threat including evidence that police found feces and a hair dryer on the floor in the bathroom. Schneider v. State, 312 Ga. App. 504, 718 S.E.2d 833 (2011).

Evidence was sufficient to support the defendant's conviction for making a terroristic threat, as the recorded conversation between the defendant and the victim, in which the defendant told the victim "You done played with my heart. I'm ready to die tonight. I think you need to be ready too," corroborated the victim's testimony. Crawford v. State, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

In a terroristic threat case, a neighbor's testimony that a vehicle fitting the description of that owned by the defendant was the vehicle driven by the shooter and

Corroboration (Cont'd)

the defendant's text messages to the complainant after the incident sufficiently corroborated the complainant's testimony that the defendant threatened to kill the complainant. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

Victim's demeanor, distraught, shaking, sobbing, and crying, after the defendant threatened the victim was adequate corroboration to support the defendant's terroristic threat conviction. Long v. State, 324 Ga. App. 882, 752 S.E.2d 54 (2013).

Because the defendant's brother testified about the phone conversation in which the defendant told the brother that the victim was already dead, the state presented evidence that the defendant's sister told a responding officer that the defendant was holding the victim hostage and had threatened to blow the victim's head off, and one of the responding officers testified that the rifle identified by the victim as the one used to hold the victim at gunpoint was found on the floor in the living room upon the defendant being taken into custody, that combined testimony clearly was sufficient to corroborate the victim's testimony regarding the threat made by the defendant and to sustain the defendant's terroristic threats conviction. Lambert v. State, 325 Ga. App. 603, 754 S.E.2d 392 (2014).

Evidence was sufficient for the jury to find the defendant guilty of aggravated assault and terroristic threats based on the trial court properly admitting the victim's testimony identifying the defendant as the person who threatened to shoot the victim early in the morning, and the testimony of the victim's friend, who also identified defendant as the person who threatened to shoot the victim. Johnson v. State, 326 Ga. App. 220, 756 S.E.2d 303 (2014).

Evidence insufficient for corroboration.

Evidence was not sufficient to support the charge of terroristic threats because the victim's testimony was completely uncorroborated. Murrell v. State, 317 Ga. App. 310, 730 S.E.2d 675 (2012).

16-11-38. Wearing mask, hood, or device which conceals identity of wearer.

JUDICIAL DECISIONS

Evidence sufficient to support conviction. — There was sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that the defendant juvenile intended to conceal the defendant's identity and to threaten, intimidate, or provoke the apprehension of violence in violation of the Anti-Mask Act, O.C.G.A. § 16-11-38, because the defendant in a mask and a friend in a hooded sweatshirt stood at the door to a stranger's house and frightened the occupants by standing motionless and silent as to their intentions. In the Interest of I.M.W., 313 Ga. App. 624, 722 S.E.2d 586 (2012).

16-11-39. Disorderly conduct.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OBSCENE, VULGAR, OR PROFANE LANGUAGE

General Consideration

Language directed at police officer. When an arrestee allegedly called an officer "a fucking asshole" and was arrested, the officer was properly denied summary judgment based on qualified immunity as to the arrestee's claims under the Fourth Amendment because the officer did not have arguable probable cause to arrest the arrestee for disorderly conduct under Georgia law since the arrestee was not shouting and did not appear to be a danger to anyone as the arrestee walked away. Merenda v. Tabor, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Feb. 1, 2013) (Unpublished).

Failure to obey deputy. — After an arrestee refused a deputy's order to turn around and pushed away from the deputy, the arrestee's false arrest claim failed because there was probable cause to arrest the arrestee for disorderly conduct since, inter alia, it was not unreasonable for the deputy to be concerned for the deputy's safety. Anthony v. Coffee County, No. 13-15477, 2014 U.S. App. LEXIS 16897 (11th Cir. Sept. 2, 2014) (Unpublished).

Sufficiency of evidence.

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and, when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Cited in In the Matter of Jones, 293 Ga. 264, 744 S.E.2d 6 (2013).

Obscene, Vulgar, or Profane Language

Directing obscene language at officer.

Defendant officer was not entitled to qualified immunity on plaintiff's Fourth Amendment claim because the officer had no arguable probable cause to arrest the plaintiff for misdemeanor obstruction under O.C.G.A. § 16-10-24(a) or disorderly conduct under O.C.G.A. § 16-11-39(a)(3) as it was undisputed that the plaintiff uttered an epithet as the plaintiff was walking away, thus ending any face-to-face confrontation, and that the officer was the only one to hear the phrase. Further, there was no arguable probable cause to arrest the plaintiff. Merenda v. Tabor, No. 5:10-CV-493 (MTT), 2012 U.S. Dist. LEXIS 63782 (M.D. Ga. May 7, 2012), aff'd in part, appeal dismissed in part, No. 12-12562, 2013 U.S. App. LEXIS 2351 (11th Cir. Ga. 2013).

16-11-39.1. Harassing communications; venue; separate offenses; impact on free speech.

(a) A person commits the offense of harassing communications if such person:

(1) Contacts another person repeatedly via telecommunication, e-mail, text messaging, or any other form of electronic communication for the purpose of harassing, molesting, threatening, or intimidating such person or the family of such person;

(2) Threatens bodily harm via telecommunication, e-mail, text messaging, or any other form of electronic communication;

(3) Telephones another person and intentionally fails to hang up or disengage the connection; or

(4) Knowingly permits any device used for telecommunication, e-mail, text messaging, or any other form of electronic communication under such person's control to be used for any purpose prohibited by this subsection.

(b) Any person who commits the offense of harassing communications shall be guilty of a misdemeanor.

(c) The offense of harassing communications shall be considered to have been committed in the county where:

(1) The defendant was located when he or she placed the telephone call or transmitted, sent, or posted an electronic communication; or

(2) The telephone call or electronic communication was received.

(d) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title.

(e) This Code section shall not apply to constitutionally protected speech. (Code 1981, § 16-11-39.1, enacted by Ga. L. 1995, p. 574, § 3; Ga. L. 2015, p. 203, § 2-1/SB 72.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsection (a) for the former provisions, which read: "A person commits the offense of harassing phone calls if such person telephones another person repeatedly, whether or not conversation ensues, for the purpose of annoying, harassing, or molesting another person or the family of such other person; uses over the telephone language threatening bodily harm; telephones and intentionally fails to hang up or disengage the connection; or knowingly permits any telephone under such person's control to be used for any purpose prohibited by this subsection."; substituted "communications" for "phone calls" in the middle of subsection (b); and added subsections (c) through (e).

Cross references. — Free speech, U.S. Const., amend I.

JUDICIAL DECISIONS

Statute does not provide private remedy. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of a lender, O.C.G.A. § 16-11-39.1, Georgia's criminal harassment statute addressing harassing telephone calls did not provide for a private remedy. Goia v. Citifinancial Auto, No. 12-12639, 2012 U.S. App. LEXIS 24825 (11th Cir. Dec. 3, 2012) (Unpublished).

Evidence sufficient to support conviction.

Defendant's conviction was affirmed because there was sufficient evidence for the trial judge to have found beyond a reasonable doubt that defendant placed telephone calls to the girlfriend for the purpose of harassing her in violation of O.C.G.A. § 16-11-39.1. Turnbull v. State, 317 Ga. App. 719, 732 S.E.2d 786 (2012).

16-11-40. Criminal defamation.

Repealed by Ga. L. 2015, p. 385, § 3-1/HB 252, effective July 1, 2015.

Editor's notes. — This Code section was based on Laws 1833, Cobb's 1851 Digest, p. 812; Code 1863, § 4407; Code 1868, § 4448; Code 1873, § 4521; Code 1882, § 4521; Penal Code 1895, § 335; Penal Code 1910, § 340; Code 1933, § 26-2101; Code 1933, § 26-2804, enacted by Ga. L. 1968, p. 1249, § 1.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

16-11-40.1. Definitions; identification of minors; criminal offense.

(a) As used in this Code section, the term:

(1) "Minor" means an individual who is under the age of 18 years.

(2) "Nudity" shall have the same meaning as set forth in Code Section 16-11-90.

(3) "Obscene depiction" means a visual depiction of an individual displaying nudity or sexually explicit conduct.

(4) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(b) No person shall intentionally cause a minor to be identified as the individual in an obscene depiction in such a manner that a reasonable person would conclude that the image depicted was that of such minor. Such identification shall include, without limitation, the minor's name, address, telephone number, e-mail address, username, or other electronic identification. Such identification shall also include the electronic imposing of the facial image of a minor onto an obscene depiction.

(c) Any person convicted of violating this Code section shall be guilty of a misdemeanor; provided, however, that upon a second or subsequent violation of this Code section, he or she shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not more than $100,000.00, or both.

(d) A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by this Code section in which such person engages while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides within or outside this state.

(e) The provisions of subsection (b) of this Code section shall not apply to:

(1) The activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses; or

(2) An image and identification made pursuant to or in anticipation of a civil action.

(f) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-11-40.1, enacted by Ga. L. 2015, p. 1212, § 1A/SB 160.)

Effective date. — This Code section became effective July 1, 2015.

Cross references. — Internet safety policies in public schools, § 20-2-324. Internet safety policies in public libraries, § 20-5-5.

16-11-41. Public drunkenness.

JUDICIAL DECISIONS

Public drunkness not included in crime of public indecency. — With regard to the defendant's conviction for felony public indecency for urinating in public, the trial court's refusal to charge the jury on public drunkenness as a lesser included offense of public indecency was not error because the crime of public drunkenness requires proof that the defendant was intoxicated, which the crime of public indecency does not; the crime of public drunkenness does not require a lewd exposure of sexual organs, which is required by the crime of public indecency; and, the crime of public indecency requires proof of exposure of sexual organs, which the crime of public drunkenness does not; therefore the offense of public drunkeness was not included in the crime of public indecency. Loya v. State, 321 Ga. App. 430, 740 S.E.2d 382 (2013).

Cited in Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 739 S.E.2d 521 (2013).

16-11-45. Use of laser against aircraft.

(a) As used in this Code section, the term:

(1) "Laser" means any device that projects a beam or point of light by means of light amplification by stimulated emission of radiation or a device that emits light which simulates the appearance of a laser.

(2) "Laser pointer" means any device designed or used to amplify electromagnetic radiation by stimulated emission that emits a beam designed to be used by the operator as a pointer or highlighter to indicate, mark, or identify a specific position, place, item, or object.

(b) Except as otherwise provided in subsection (c) of this Code section, whoever knowingly and intentionally aims the beam of a laser pointer, or projects a laser, at an aircraft or at the flight path of an aircraft shall be guilty of a misdemeanor.

(c) Laser or laser pointer airspace uses that have been reviewed and approved by the Federal Aviation Administration are exempt from the provisions of this Code section. (Code 1981, § 16-11-45, enacted by Ga. L. 2012, p. 1142, § 2/SB 441.)

Effective date. — This Code section became effective July 1, 2012. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1142, § 3/SB 441, not codified by the General Assembly, provides that this Code section applies to offenses committed on or after July 1, 2012.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A.§ 16-11-45 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

ARTICLE 3

INVASIONS OF PRIVACY

Law reviews. — For note, "Just You and Me and Netflix Makes Three: Implications for Allowing 'Frictionless Sharing' of Personally Identifiable Information under the Video Privacy Protection Act," see 20 J. Intell. Prop. L. 413 (2013).

PART 1

WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

16-11-60. Definitions.

As used within this part, the term:

(1) "Device" means an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds or for observing, photographing, videotaping, recording, or transmitting visual images and which involves in its operation electricity, electronics, or infrared, laser, or similar beams. Without limiting the generality of the foregoing, the term "device" shall specifically include any camera, photographic equipment, video equipment, or other similar equipment or any electronic, mechanical, or other apparatus which can be used to intercept a wire, oral, or electronic communication other than:

(A) Any telephone or telegraph instrument, equipment, or facility or any component thereof:

(i) Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

(ii) Being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his or her duties; or

(B) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(C) Focusing, lighting, or illuminating equipment, optical magnifying equipment; and

(D) A "pen register" or "trap and trace device" as defined in this Code section.

(2) "Pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted; provided, however, that such information shall not include the contents of any communication; but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course its business.

(3) "Private place" means a place where there is a reasonable expectation of privacy.

(4) "Trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication; provided, however, that such information shall not include the contents of any communication. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3009, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1995, p. 1051, § 2; Ga. L. 2000, p. 875, § 1; Ga. L. 2002, p. 1432, § 2; Ga. L. 2015, p. 1046, § 1/SB 94.)

The 2015 amendment, effective July 1, 2015, substituted "there is a reasonable expectation of privacy" for "one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance" in paragraph (3).

Law reviews. — For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," 46 Ga. L. Rev. 1089 (2012).

16-11-62. Eavesdropping, surveillance, or intercepting communication which invades privacy of another; divulging private message.

It shall be unlawful for:

(1) Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place;

(2) Any person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view; provided, however, that it shall not be unlawful:

(A) To use any device to observe, photograph, or record the activities of persons incarcerated in any jail, correctional institution, or other facility in which persons who are charged with or who have been convicted of the commission of a crime are incarcerated, provided that such equipment shall not be used while the prisoner is discussing his or her case with his or her attorney;

(B) For an owner or occupier of real property to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are on the property or an approach thereto in areas where there is no reasonable expectation of privacy;

(C) To use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are within the curtilage of the residence of the person using such device. A photograph, videotape, or record made in accordance with this subparagraph, or a copy thereof, may be disclosed by such resident to the district attorney or a law enforcement officer and shall be admissible in a judicial proceeding, without the consent of any person observed, photographed, or recorded; or

(D) For a law enforcement officer or his or her agent to use a device in the lawful performance of his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent;

(3) Any person to go on or about the premises of another or any private place, except as otherwise provided by law, for the purpose of invading the privacy of others by eavesdropping upon their conversations or secretly observing their activities;

(4) Any person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent

by telephone, telegraph, letter, or by any other means of private communication;

(5) Any person to divulge to any unauthorized person or authority the content or substance of any private message intercepted lawfully in the manner provided for in Code Section 16-11-65;

(6) Any person to sell, give, or distribute, without legal authority, to any person or entity any photograph, videotape, or record, or copies thereof, of the activities of another which occur in any private place and out of public view without the consent of all persons observed; or

(7) Any person to commit any other acts of a nature similar to those set out in paragraphs (1) through (6) of this Code section which invade the privacy of another. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3001, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1100, § 1; Ga. L. 1985, p. 149, § 16; Ga. L. 2000, p. 491, § 1; Ga. L. 2000, p. 875, § 2; Ga. L. 2015, p. 1046, § 2/SB 94.)

The 2015 amendment, effective July 1, 2015, deleted "any" preceding "other facility" near the middle of subparagraph (2)(A); deleted "or" at the end of subparagraph (2)(B); added "or" at the end of subparagraph (2)(C); and added subparagraph (2)(D).

Law reviews. — For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," 46 Ga. L. Rev. 1089 (2012).

JUDICIAL DECISIONS

Analysis

General Consideration
Waiver of Right to Privacy

General Consideration

Subparagraph (2)(C) held irreconcilable. — Under Ga. Laws 2000, p. 491, § 1, one who surreptitiously records the activities of another within the curtilage of his or her home has done nothing unlawful because O.C.G.A. § 16-11-62(2)(C) creates an exception to the general prohibition set forth in § 16-11-62 but under Ga. Law 2000, p. 875, § 2, the same conduct is deemed unlawful; thus, the two statutes pertaining to the same conduct are irreconcilably inconsistent, therefore, subparagraph (2)(C) does not survive. Rutter v. Rutter, 294 Ga. 1, 749 S.E.2d 657 (2013) (decided prior to the amendment to Code Section 28-9-5 enacted by Ga. L. 2014, p. 866, § 28/SB 340). (The version of Code Section 16-11-62 that was in effect on the date of this decision, as set out in the bound volume, was subsequently reenacted and adopted by the General Assembly in 2014, by Ga. L. 2014, p. 866, § 54/SB 340.)

Private places.

Defendant's conviction for invasion of privacy was affirmed because the evidence showed that the stepdaughter did not give her consent to be recorded while taking a shower; thus, the defendant clearly did not have the consent of all persons. Price v. State, 320 Ga. App. 85, 738 S.E.2d 289 (2013).

Telephone calls from jail.

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were ad-

missible and not privileged under former O.C.G.A. § 24-9-24 (see now O.C.G.A. § 24-5-501) because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Such a recording did not violate O.C.G.A. § 16-11-62 because that statute contained an express exception for recording jail calls. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011).

Admission of audio only from videotape. — Trial court did not err in denying the defendant's motion for new trial because the defendant failed to show that a reasonable probability existed that the outcome of the case would have been different but for trial counsel's failure to file a motion to suppress videotaped evidence showing the drug sales transactions in the defendant's residence on the ground that the videotaping was done in violation of O.C.G.A. § 16-11-62; the defendant acknowledged that the audio recording of what transpired inside the home was admissible, even if the video portion of the tape inside the home had been excluded, and in addition to the audio tape of the transaction, an informant testified in detail about the events during the two buys and identified the defendant as the person who was present and participated in both buys. Durham v. State, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

Waiver of Right to Privacy

Emails of employees. — Trial court did not err in admitting into evidence an email because O.C.G.A. § 16-11-62 was not applicable; a former employer's president went into a former employee's office, which was owned by the business of which the president was the chief executive officer and was used by the employee, who was under the president's authority, and there was no evidence that the president eavesdropped on the employee's conversations or secretly observed the employee's activities. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

16-11-64. Interception of wire or oral transmissions by law enforcement officers.

(a) **Application of part to law enforcement officers.** Except only as provided in subsection (b) of this Code section, nothing in this part shall apply to a duly constituted law enforcement officer in the performance of his official duties in ferreting out offenders or suspected offenders of the law or in secretly watching a person suspected of violating the laws of the United States or of this state, or any subdivision thereof, for the purpose of apprehending such suspected violator.

(b) When in the course of his or her official duties, a law enforcement officer desiring to make use of any device, but only as such term is defined in Code Section 16-11-60, and such use would otherwise constitute a violation of Code Section 16-11-62, the law enforcement official shall act in compliance with the provisions provided for in this part.

(c) Upon written application, under oath, of the district attorney having jurisdiction over prosecution of the crime under investigation or the Attorney General made before a judge of superior court having jurisdiction over the crime under investigation, such court may issue an investigation warrant permitting the use of a device for the surveillance of a person or place to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by 18 U.S.C. Chapter 119. Such warrant shall have state-wide application and interception of communications shall be permitted in any location in this state.

(d) Evidence obtained in conformity with this part shall be admissible only in the courts of this state having felony and misdemeanor jurisdiction.

(e) **Defenses.** A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this part or under any other law. (Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3004, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1972, p. 615, § 1; Ga. L. 1972, p. 952, § 1; Ga. L. 1979, p. 824, § 1; Ga. L. 1980, p. 326, § 1; Ga. L. 1982, p. 1385, § 7; Ga. L. 1982, p. 2319, § 1; Ga. L. 1983, p. 3, § 13; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 149, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 2000, p. 491, § 2; Ga. L. 2002, p. 1432, § 3; Ga. L. 2013, p. 4, § 1/HB 55.)

The 2013 amendment, effective February 13, 2013, rewrote subsection (c), which formerly read "Upon written application, under oath, of the prosecuting attorney having jurisdiction over prosecution of the crime under investigation, or the Attorney General, made before a judge of superior court, said court may issue an investigation warrant permitting the use of such device, as defined in Code Section 16-11-60, for the surveillance of such person or place to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by Chapter 119 of Title 18 of the United States Code Annotated, as amended."

Law reviews. — For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 109 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

No prohibition against evidence gathered as part of federal investigation. — O.C.G.A. § 16-11-64(c) merely provides authority to Georgia superior court judges to issue wiretap warrants upon proper application by the prosecuting attorney, and the statute contains no prohibition against evidence gathered as part of a federal investigation in compliance with the federal warrant process. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Jurisdiction of warrant issuing court. — Appellate court erred in affirming a trial court's denial of the appellants' motion to suppress because the warrants were invalid since the Gwinnett County Superior Court lacked the authority to issue the wiretap warrants for the inter-

ceptions in the case which took place exclusively in Fulton County. In conclusion, the Supreme Court of Georgia concludes that Georgia superior courts do not currently possess the authority to issue wiretap warrants for interceptions conducted outside the boundaries of their respective judicial circuits. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Warrant not issued by superior court judge. — Trial court erred by granting defendant's motion to suppress because the fact that the warrant was not initially issued by a Georgia superior court judge did not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c) and that fact did not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

16-11-64.1. Application and issuance of order authorizing installation and use of pen register or trap and trace device.

Any district attorney having jurisdiction over the prosecution of the crime under investigation or the Attorney General is authorized to make application for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device to a judge of the superior court of the same judicial circuit as the district attorney, or, in the case of the Attorney General, in any judicial circuit; and such court shall be authorized to enter an order authorizing the use of a pen register or a trap and trace device, to the extent the same is consistent with and permitted by the laws of the United States. Such order shall have state-wide application and the interception by use of a pen register or trap and trace device shall be permitted in any location in this state. (Code 1981, § 16-11-64.1, enacted by Ga. L. 1995, p. 1051, § 3; Ga. L. 2005, p. 635, § 1/SB 269; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2013, p. 4, § 2/HB 55.)

The 2013 amendment, effective February 13, 2013, substituted "such court shall be" for "said court is" near the middle and added the last sentence.

Law reviews. — For article on the 2013 amendment of this Code section, see 30 Ga. St. U.L. Rev. 109 (2013).

16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception.

Law reviews. — For note, "Location, Location, Location: A 'Private' Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System," 46 Ga. L. Rev. 1089 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Telephone calls from jail.

Because none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

16-11-66.1. Disclosure of stored wire or electronic communications; records; search warrants; issuance of subpoena; violation.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013).

JUDICIAL DECISIONS

Cited in Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

16-11-67. Admissibility of evidence obtained in violation of part.

Law reviews. — For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 16-11-64. — O.C.G.A. § 16-11-64(c) merely provides authority to Georgia superior court judges to issue wiretap warrants upon proper application by the prosecuting attorney, and the statute contains no prohibition against evidence gathered as part of a federal investigation in compliance with the federal warrant process. Furthermore, the fact that the warrant was not initially issued by a Georgia superior court judge does not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c), and that fact does not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Jurisdiction of warrant issuing court. — Supreme Court of Georgia concludes that Georgia superior courts do not currently possess the authority to issue wiretap warrants for interceptions conducted outside the boundaries of their respective judicial circuits. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Appellate court erred in affirming a trial court's denial of the appellants' motion to suppress because the warrants were invalid since the Gwinnett County Superior Court lacked the authority to issue the wiretap warrants for the interceptions in the case which took place exclusively in Fulton County. Luangkhot v. State, 292 Ga. 423, 736 S.E.2d 397 (2013).

Issuance of a warrant by superior court judge. — Trial court erred by granting the defendant's motion to suppress because the fact that the warrant was not initially issued by a Georgia superior court judge did not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c) and that fact did not require suppression of evidence gathered pursuant to the warrant. State v. Harrell, 323 Ga. App. 56, 744 S.E.2d 867 (2013).

Evidence properly excluded. — Be-

cause none of the types of communication encompassed by O.C.G.A. § 16-11-66(a) were at issue, because the parties stipulated that the video recordings the victim made between the victim and defendant without defendant's consent were in a private place, and because the participant's exception in § 16-11-66(a) applied to O.C.G.A. § 16-11-62 in its entirety, pursuant to O.C.G.A. § 16-11-67, the trial court properly excluded the recordings. State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011).

16-11-68. Admissibility of privileged communications.

Cross references. — Privileged communications generally, § 24-5-506 et seq.

Part 3

Invasion of Privacy

Effective date. — This part became effective July 1, 2014.

16-11-90. Prohibition on nude or sexually explicit electronic transmissions.

(a) As used in this Code section, the term:

(1) "Harassment" means engaging in conduct directed at a depicted person that is intended to cause substantial emotional harm to the depicted person.

(2) "Nudity" means:

(A) The showing of the human male or female genitals, pubic area, or buttocks without any covering or with less than a full opaque covering;

(B) The showing of the female breasts without any covering or with less than a full opaque covering; or

(C) The depiction of covered male genitals in a discernibly turgid state.

(3) "Sexually explicit conduct" shall have the same meaning as set forth in Code Section 16-12-100.

(b) A person violates this Code section if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person:

(1) Electronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person; or

(2) Causes the electronic transmission or posting, in one or more transmissions or posts, of a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.

(c) Any person who violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature; provided, however, that upon a second or subsequent violation of this Code section, he or she shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than five years, a fine of not more than $100,000.00, or both.

(d) A person shall be subject to prosecution in this state pursuant to Code Section 17-2-1 for any conduct made unlawful by this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves an individual who resides within or outside this state.

(e) The provisions of subsection (b) of this Code section shall not apply to:

(1) The activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses;

(2) Legitimate medical, scientific, or educational activities;

(3) Any person who transmits or posts a photograph or video depicting only himself or herself engaged in nudity or sexually explicit conduct;

(4) The transmission or posting of a photograph or video that was originally made for commercial purposes;

(5) Any person who transmits or posts a photograph or video depicting a person voluntarily engaged in nudity or sexually explicit conduct in a public setting; or

(6) A transmission that is made pursuant to or in anticipation of a civil action.

(f) There shall be a rebuttable presumption that an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet, for

content provided by another person, does not know the content of an electronic transmission or post.

(g) Any violation of this Code section shall constitute a separate offense and shall not merge with any other crimes set forth in this title. (Code 1981, § 16-11-90, enacted by Ga. L. 2014, p. 220, § 1/HB 838; Ga. L. 2015, p. 5, § 16/HB 90.)

The 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, deleted "or" at the end of paragraph (e)(4); and substituted "A transmission that is" for "The transmission is" at the beginning of paragraph (e)(6).

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Libel and slander, C. 5, T. 51.

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-11-130.2, 16-11-90(b), 16-8-14.1(a), 16-8-22, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Liability for Violation of Privacy of Internet User by Use of Cookies or Other Means, 67 POF3d 249.

ARTICLE 4

DANGEROUS INSTRUMENTALITIES AND PRACTICES

Part 1

General Provisions

16-11-101.1. Furnishing pistol or revolver to person under the age of 18 years.

(a) For the purposes of this Code section, the term:

(1) "Minor" means any person under the age of 18 years.

(2) "Pistol or revolver" means a handgun as defined in subsection (a) of Code Section 16-11-125.1.

(b) It shall be unlawful for a person intentionally, knowingly, or recklessly to sell or furnish a pistol or revolver to a minor, except that it shall be lawful for a parent or legal guardian to permit possession of a pistol or revolver by a minor for the purposes specified in subsection

(c) of Code Section 16-11-132 unless otherwise expressly limited by subsection (c) of this Code section.

(c)(1) It shall be unlawful for a parent or legal guardian to permit possession of a pistol or revolver by a minor if the parent or legal guardian knows of a minor's conduct which violates the provisions of Code Section 16-11-132 and fails to make reasonable efforts to prevent any such violation of Code Section 16-11-132.

(2) Notwithstanding any provisions of subsection (c) of Code Section 16-11-132 or any other law to the contrary, it shall be unlawful for any parent or legal guardian intentionally, knowingly, or recklessly to furnish to or permit a minor to possess a pistol or revolver if such parent or legal guardian is aware of a substantial risk that such minor will use a pistol or revolver to commit a felony offense or if such parent or legal guardian who is aware of such substantial risk fails to make reasonable efforts to prevent commission of the offense by the minor.

(3) In addition to any other act which violates this subsection, a parent or legal guardian shall be deemed to have violated this subsection if such parent or legal guardian furnishes to or permits possession of a pistol or revolver by any minor who has been convicted of a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, or who has been adjudicated for committing a delinquent act under the provisions of Article 6 of Chapter 11 of Title 15 for an offense which would constitute a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, if such minor were an adult.

(d) Upon conviction of a violation of subsection (b) or (c) of this Code section, a person shall be guilty of a felony and punished by a fine not to exceed $5,000.00 or by imprisonment for not less than three nor more than five years, or both. (Code 1981, § 16-11-101.1, enacted by Ga. L. 1994, p. 1012, § 13; Ga. L. 2000, p. 1630, § 1; Ga. L. 2010, p. 963, § 2-6/SB 308; Ga. L. 2013, p. 294, § 4-9/HB 242.)

The 2013 amendment, effective January 1, 2014, in paragraph (c)(3), substituted "adjudicated for committing a delinquent act" for "adjudicated delinquent" and substituted "Article 6" for "Article 1". See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-102. Pointing or aiming gun or pistol at another.

JUDICIAL DECISIONS

Absence of justification as an element. — Guilty verdict for aggravated assault under O.C.G.A. § 16-5-21(a) was not necessarily inconsistent because an O.C.G.A. § 16-11-102 pointing a gun count (for which petitioner inmate was found not guilty) included the element of acting without justification, an element not involved in the aggravated assault charge; counsel was not ineffective for not requesting an instruction on the specific method of committing the aggravated assault charged. Leroy Banks v. Georgia, No. 12-11237, 2013 U.S. App. LEXIS 7880 (11th Cir. Apr. 19, 2013) (Unpublished).

Charge properly refused.

Defendant was not entitled to a jury charge on the misdemeanors of pointing a gun at another, O.C.G.A. § 16-11-102, as a lesser included offense of the felony counts of aggravated assault because the victims were placed in reasonable apprehension of immediately receiving a violent injury when the defendant pointed a gun at the victims; the only testimony was that the weapon was pointed as a threat and perceived as such and, therefore, an assault. Dailey v. State, 313 Ga. App. 809, 723 S.E.2d 43 (2012), cert. denied, No. S12C0969, 2012 Ga. LEXIS 551 (Ga. 2012).

16-11-103. Discharge of gun or pistol near public highway; penalty.

(a) As used in this Code section, the term:

(1) "Firearm" means any handgun, rifle, or shotgun.

(2) "Public highway" means every public street, road, and highway in this state.

(3) "Sport shooting range" means an area designated and operated by a person or entity for the sport shooting of firearms, target practice, trapshooting, skeet shooting, or shooting sporting clays and not available for such use by the general public without payment of a fee, membership contribution, or dues or without the invitation of an authorized person, or any area so designated and operated by a unit of government, regardless of the terms of admission thereto.

(4) "Unit of government" means any of the departments, agencies, authorities, or political subdivisions of the state, cities, municipal corporations, townships, or villages and any of their respective departments, agencies, or authorities.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful for any person, without legal justification, to discharge a firearm on or within 50 yards of a public highway.

(c) This Code section shall not apply to a discharge of a firearm which occurs within 50 yards of a public highway if such discharge is shielded from the view of a traveler on the public highway and occurs at:

(1) An indoor or outdoor sport shooting range;

(2) Facilities used for firearm or hunting safety courses sponsored by a unit of government, nonprofit corporation, or commercial enterprise; or

(3) The business location of any person, firm, retail dealer, wholesale dealer, pawnbroker, or corporation licensed as a firearm dealer pursuant to Chapter 16 of Title 43.

(d) Any person who violates subsection (b) of the Code section shall be guilty of a misdemeanor. (Ga. L. 1882-83, p. 131, §§ 1, 2; Penal Code 1895, § 508; Penal Code 1910, § 504; Code 1933, § 26-7301; Code 1933, § 26-2909, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 2014, p. 200, § 1/HB 773.)

The 2014 amendment, effective April 15, 2014, substituted the present provisions of this Code section for the former provisions, which read: "A person is guilty of a misdemeanor when, without legal justification, he discharges a gun or pistol on or within 50 yards of a public highway or street."

16-11-106. Possession of firearm or knife during commission of or attempt to commit certain crimes.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Jury Instructions
Punishment

General Consideration

Length of blade determination. — While there was no evidence as to the length of the knife, the trial court was authorized to determine if the blade met the requirements for the defendant's conviction for possession of a knife during the commission of a crime. Petro v. State, 327 Ga. App. 254, 758 S.E.2d 152 (2014).

Multiple convictions.

Two of the five convictions for possession of a firearm during the commission of a crime must be vacated, because there were two individual victims and defendant was convicted of burglary, a crime enumerated in O.C.G.A. § 16-11-106(b)(2). Accordingly, the statute authorized imposition of sentence on defendant for three of the guilty verdicts returned on the five counts charging the defendant with being in possession of a firearm during the commission of a crime: the count in which burglary was the underlying felony, one of the counts in which one person was the victim, and one of the counts in which another person was the victim. Grell v. State, 291 Ga. 615, 732 S.E.2d 741 (2012).

Evidence of possession sufficient.

Sufficient evidence showed the defendant committed possession of a firearm, under O.C.G.A. § 16-11-106(b), in the process of hijacking a victim's vehicle and

committing an aggravated assault of the victim, because the defendant undisputedly possessed a handgun during the commission of these crimes and fled the scene. Campbell v. State, 314 Ga. App. 299, 724 S.E.2d 24 (2012).

Evidence was sufficient to convict the defendant of aggravated assault, motor-vehicle hijacking, and possession of a firearm during the commission of a crime, under O.C.G.A. §§ 16-5-21(a)(2), 16-5-44.1(b), and 16-11-106(b)(1), because the defendant waited in a getaway vehicle while an accomplice hijacked the victim's vehicle, and possessed the gun that the accomplice used in the crime. Gordon v. State, 316 Ga. App. 42, 728 S.E.2d 720 (2012).

As the first defendant aided and abetted in effecting a plan to steal the victim's car, and as the second defendant took the victim's money, the evidence was sufficient to convict both of the defendants of armed robbery, hijacking a motor vehicle, and possession of a firearm during the commission of a crime under O.C.G.A. §§ 16-5-44.1, 16-8-41(a), and 16-11-106. Copeny v. State, 316 Ga. App. 347, 729 S.E.2d 487 (2012).

Sufficient evidence supported the defendant's convictions for armed robbery, hijacking a motor vehicle, and two counts of possession of a firearm because the evidence showed that the defendant was identified by the victim, the defendant was arrested about an hour and a half after the crimes occurred in the Lincoln Town car used during the commission of the crimes, which the defendant admitted belonged to the defendant, and the cell phone that the victim had reported stolen was found in the car in addition to guns matching the victim's description of the weapons used. Hinton v. State, 321 Ga. App. 445, 740 S.E.2d 394 (2013).

Evidence sufficient to support convictions. — Evidence including DNA evidence, the victim's testimony regarding the nature of the attack and description of the attacker, and the store surveillance video of an individual who wore clothing similar to that worn by the attacker and who appeared to be the same race as the attacker, supported the defendant's convictions for rape, kidnapping, armed robbery, theft by taking, and three counts of possession of a gun during the commission of a crime. Glaze v. State, 317 Ga. App. 679, 732 S.E.2d 771 (2012).

Evidence was sufficient to convict the defendant of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct because the defendant slammed the refrigerator door twice, breaking items stored in the door; the victim called 9-1-1 seeking assistance for a domestic dispute in progress; when one of the responding officers told the defendant that the defendant would have to leave the house as the victim did not want the defendant living there, the defendant told the officer that the officer could not make the defendant leave; and, when the officer unsnapped a taser from the taser's holster and approached the defendant, the defendant grabbed a knife with an eight-inch blade and threatened the officers with the knife. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Cited in Anthony v. State, 315 Ga. App. 701, 727 S.E.2d 528 (2012); Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012); Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013); Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013); Springer v. State, No. A14A0598, 2014 Ga. App. LEXIS 368 (June 10, 2014); Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014); Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014); Young v. State, 329 Ga. App. 70, 763 S.E.2d 735 (2014); Williams v. State, 330 Ga. App. 606, 768 S.E.2d 788 (2015).

Application

Possession of black powder guns sufficient. — Evidence that the defendant was found in possession of two black powder guns was sufficient to support the convictions for possession of a firearm during the commission of a crime and by a convicted felon. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

Felony requirement.

Offense of criminal damage to property in the first degree, pursuant to O.C.G.A. § 16-7-22(a)(1), involves a person, and thus may serve as a predicate for a conviction for possession of a firearm during

Application (Cont'd)

the commission of a felony under O.C.G.A. § 16-11-106(b)(1). Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Merger for continuous crime spree.

Robbers in a home robbery and murder had one gun, and there were two victims of the crimes, the decedent and the decedent's grandmother; therefore, under O.C.G.A. § 16-11-106(b)(1), the defendant should have been convicted of only two counts of possession of a firearm while committing a crime, one for each of the victims, and the third count should have been merged. Moore v. State, 294 Ga. 682, 755 S.E.2d 703 (2014).

Armed robbery by use of a firearm.

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, defendant's clothing, a text message between the defendant and defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Jury was authorized to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony based on the witnesses' positive identification of the defendant's distinctive speech; the ski mask and salad bag found in the defendant's vehicle from the restaurant robbed; and the sudden, labored, and sweaty appearance of the defendant immediately after the robbery and high speed chase. Walker v. State, 329 Ga. App. 369, 765 S.E.2d 599 (2014).

Armed while trafficking in drugs.

Trial court erred in convicting the defendant of trafficking in cocaine, O.C.G.A. § 16-13-31(a)(1), trafficking in methamphetamine, O.C.G.A. § 16-13-31(e), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(a)(5), because the state failed to prove any connection between the defendant and the contraband other than spatial proximity; no drugs were found on the defendant's person, and the defendant was not seen in proximity to the well-hidden drugs. Cobarrubias-Garcia v. State, 316 Ga. App. 787, 730 S.E.2d 455 (2012).

Jury was authorized to find defendant guilty, etc.

Jury's verdict of acquittal on an aggravated assault charge and guilty on the charge of possession of a firearm during the commission of a crime was not necessarily inconsistent because the jury was free to reject the defendant's testimony that the defendant did not know the defendant's passenger had a gun and accept the defendant's testimony that the defendant was unaware of the intended robbery. Morrell v. State, 313 Ga. App. 443, 721 S.E.2d 643 (2011), cert. denied, No. S12C0800, 2012 Ga. LEXIS 484 (Ga. 2012).

Convictions as aider and abettor proper despite lack of personal involvement.

Sufficient evidence supported the defendant's convictions as a party to the crimes of armed robbery, aggravated assault against the manager and cashier, and possession of a firearm during the commission of the armed robbery because the law allowed the defendant to be charged with and convicted of the same offenses as the codefendant since the evidence showed that the defendant drove the codefendant to the fast food restaurant that was robbed and waited as the getaway driver. Broyard v. State, 325 Ga. App. 794, 755 S.E.2d 36 (2014).

Identification of defendant sufficient.

Defendant's convictions for armed robbery, aggravated assault with a deadly weapon, burglary, and possession of a firearm during the commission of a crime were supported by sufficient evidence. While the defendant contended that the evidence against the defendant was purely circumstantial, an eyewitness's identification of the defendant as the second gunman during the photographic lineup constituted direct evidence of the defendant's guilt. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Defendant's new trial motion based on insufficient evidence lacked merit as the

evidence was sufficient to support the defendant's convictions for aggravated assault and a weapons possession charge under O.C.G.A. §§ 16-5-21(a)(2) and 16-11-106(b)(1); issues of credibility regarding the witnesses' identification of the defendant as the shooter were within the jury's province pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). Williams v. State, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Evidence sufficient to support conviction.

Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a felony because the defendant and a codefendant began shooting across a street at someone, who returned fire, and the victim was an innocent 16-year-old bystander who was killed during the shootout. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Evidence was sufficient to support a conviction for possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b)(1) since, while possessing a firearm, the defendant knowingly and without authority interfered with property in a manner endangering human life by shooting at an inhabited apartment building. Craft v. State, 309 Ga. App. 698, 710 S.E.2d 891 (2011).

Evidence was sufficient to support the defendant's conviction for malice murder, aggravated assault, conspiracy to commit armed robbery, and possession of a firearm during the commission of a crime because evidence was presented that the defendant and a codefendant entered a restaurant to rob the restaurant and shot two employees of the restaurant. In a statement to the police, the defendant admitted that the defendant entered the restaurant with a handgun to rob the restaurant, but the defendant claimed that the defendant heard gunshots and left the restaurant, while the codefendant gave a similar statement to the police. Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of possession of a firearm during the commission of bus hijacking, O.C.G.A. § 16-11-106(b)(1), and possession of a firearm during the commission of aggravated assault, § 16-11-106(b)(1), because the defendant committed the substantive offenses of bus hijacking and aggravated assault with a handgun; therefore, the evidence was sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt of possession of a firearm during the commission of the defendant's felony convictions. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8) to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find both the defendants guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict because the evidence was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of distribution of marijuana, O.C.G.A. § 16-13-30(j), and possession of a firearm during the commission of a felony,

Application (Cont'd)

O.C.G.A. § 16-11-106(b)(4); the testimony of a party to the transaction was corroborated by the observations of the detectives, the marijuana taken into evidence, the written statements of the parties regarding the defendant's involvement, and the defendant's own statement to a detective. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Evidence was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime, under O.C.G.A. § 16-11-106(b), because: (1) the perpetrator of a crime entered just before closing time a fast-food restaurant with a gun and directed the employees into a room, a cooler, and a freezer; (2) the perpetrator took money from the restaurant, shot one of the employees, and left the scene in the employee's car; (3) one of the employees telephoned relatives with a cell phone and told them what was happening; (4) the relatives called the police, came to the restaurant, and saw the perpetrator drive away; (5) money, a gun, and discarded clothing was recovered from the car or the area where the perpetrator fled on foot; (6) a police officer, who was pursuing the perpetrator, was wounded in an altercation with the perpetrator when the officer's gun discharged; (7) when the defendant later surrendered to the police, DNA from the officer's blood was found on the defendant's chest; and (8) the employees, the relatives, and the officer identified the defendant, a former employee of the restaurant who was fired days before the crime, as the perpetrator. Donald v. State, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find the defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the driver of a delivery truck was forced at gunpoint by the defendant's accomplice to drive a substantial distance to a secluded dirt road, and because the defendant followed the truck in another vehicle, pursuant to O.C.G.A. §§ 16-2-20 and 16-5-40(a), the evidence was sufficient to convict the defendant of kidnapping and possession of a firearm during the commission of a felony. Sipplen v. State, 312 Ga. App. 342, 718 S.E.2d 571 (2011).

Evidence was sufficient to authorize the defendant's convictions for hijacking a motor vehicle, in violation of O.C.G.A. § 16-5-44.1(b), armed robbery, in violation of O.C.G.A. § 16-8-41, aggravated assault, in violation of O.C.G.A. § 16-5-21(a)(2), and possession of a knife during the commission of a crime, in violation of O.C.G.A. § 16-11-106(b), based on the defendant's involvement as a party to the crimes, or as a coconspirator under O.C.G.A. § 16-2-20(b). The evidence presented was that: (1) when two people walked past the victim's parked vehicle, one of the people held a knife to the victim's stomach and ordered the victim to give the person the victim's wallet and keys; (2) the victim complied; (3) the person with the knife got into the driver's seat and the other person, who had stood nearby during the incident, got into the passenger seat; (3) the victim identified the defendant as the person who got into the passenger seat; (4) the people drove away, but were apprehended; (5) the victim's wallet was recovered, on the ground to the rear of the vehicle, on the passenger side; and (6) the victim, who was without money, wanted to leave the area because there was a warrant for the defendant's arrest. Harrelson v. State, 312 Ga. App. 710, 719 S.E.2d 569 (2011).

Rational trier of fact could have found beyond a reasonable doubt that the evidence was sufficient to establish that the defendant was guilty of aggravated assault, possession of a firearm during the commission of a felony, hijacking a motor vehicle, and armed robbery because there was ample evidence, based upon the defendant's actions and presence, companionship, conduct, and demeanor before, during, and after the commission of the crime, to conclude that the defendant was more than "merely present" during the commission of the crimes and was a party to the crimes pursuant to O.C.G.A. § 16-2-20; while in a car with the victim and companions, the front-seat passenger pulled out a gun and shot the victim, and during the incident, the defendant did not say or do anything to intervene. Cook v. State, 314 Ga. App. 289, 723 S.E.2d 709 (2012).

Evidence was sufficient to support the defendant's convictions for felony murder, aggravated assault, possession of a firearm during the commission of a crime, and participation in criminal street gang activity. The defendant and fellow gang members walked toward a group of teenagers in a front yard while yelling and making gang signals; the defendant fired once into the crowd, killing the victim, who was unarmed; and the defendant, who fled the scene, was the only person who fired a weapon and was identified to police as the shooter by witnesses who knew the defendant by name. Jackson v. State, 291 Ga. 25, 727 S.E.2d 120 (2012).

Evidence was sufficient to support a finding that the defendant was guilty beyond a reasonable doubt of aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), and possession of a firearm during the commission of a crime against another person, O.C.G.A. § 16-11-106(b)(1), because a witness and a friend testified that they saw the defendant shoot the victim. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012).

Evidence was sufficient to sustain convictions for armed robbery and possession of a firearm during the commission of a felony since the evidence showed that the defendant either directly committed or was a party to the armed robberies of both victims at the rest area. A custodian present at the scene identified the defendant as one of the perpetrators who had participated in the crimes, and the defendant's flight from the rest area, flight from the officers, act of driving the getaway car, and possession of one victim's driver's license and clothing items linked the defendant to the crimes. Bryson v. State, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Sufficient evidence supported the defendant's conviction for possession of a firearm during the commission of a felony, despite the defendant's claim that the defendant took nothing from the victim and did not point a weapon at the victim, because: (1) it was undisputed that the crime occurred; and, (2) whether the defendant or the defendant's accomplice pointed the gun and took the property, the defendant could be convicted through the defendant's role as a party, under O.C.G.A. § 16-2-21. Bush v. State, 317 Ga. App. 439, 731 S.E.2d 121 (2012).

Defendant's convictions for possession of marijuana and a firearm were affirmed because, although circumstantial, the evidence was sufficient to show that the weapon was within arm's reach of the defendant during the commission of a crime. Under the circumstances, the trial court could find that, given the close proximity, the defendant passed within reach of the handgun while handling the marijuana. Carter v. State, 319 Ga. App. 609, 737 S.E.2d 714 (2013).

Evidence that the defendant kicked in a door and entered an occupied apartment with others, the defendant provided the guns used, the defendant placed a gun to one victim's head, a victim's wallet and key were taken, and marijuana, digital scales, and a device used to grind marijuana were found at the defendant's house was sufficient to support the defendant's convictions for four counts of aggravated assault, three counts of false imprisonment, and one count each of armed robbery, burglary, possession of marijuana with intent to distribute, and possession of a firearm during the commission of a felony. Thompson v. State, 320 Ga. App. 150, 739 S.E.2d 434 (2013).

Defendant's claim that the evidence was insufficient to support the convictions for

Application (Cont'd)

malice murder and possession of a firearm during the commission of a felony because the state was unable to present evidence to disprove the earlier incident between the defendant and the victim or disprove that the defendant acted in self-defense when the defendant shot the victim failed because testimony from eyewitnesses to the shooting and forensic evidence belied the claim that the defendant acted in self-defense. Among other things, the defendant testified the defendant shot the victim because the victim pulled out a knife, claiming the defendant saw the blade; however, two closed pocket knives were found. Hoffler v. State, 292 Ga. 537, 739 S.E.2d 362 (2013).

Testimony from two witnesses that the witnesses recognized the defendant from the defendant's distinctive walk and that one also recognized the defendant from the defendant's posture, shoulders, complexion, and nose; the fact that a dark fiber like one that could have been from the shooter's wig was found in the defendant's truck; and the defendant's admission to an inmate that the defendant shot the victim supported the defendant's convictions for malice murder and possession of a firearm during the commission of a felony. Hayes v. State, 292 Ga. 506, 739 S.E.2d 313 (2013).

Victim's testimony that the defendant approached the victim, thrust a gun about six inches from the victim's face, took the victim's cell phone and keys, and told the victim to "get out of here", while waving a gun, was sufficient to support the defendant's convictions for armed robbery, possession of a firearm during the commission of a crime, aggravated assault, and theft by taking. Wright v. State, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Testimony of an accomplice that the defendant was with the others during the robbery of the first victim and ran off and ate pizza with everyone afterward and the testimony of the second victim identifying the defendant at trial as the man the second victim spoke to about selling a Blackberry while an accomplice put a gun to the second victim's neck, searched the second victim's pockets, and took the second victim's Blackberry and wallet, was sufficient to support the defendant's convictions for armed robbery and possession of a firearm during the commission of a felony. Fuller v. State, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

Evidence was sufficient to support convictions for armed robbery and possession of a firearm during the commission of a crime, as the state presented the requisite corroboration to the codefendant's testimony; the getaway driver's testimony about the height of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013).

Testimony of an inmate, who had been housed with the defendant when the defendant was in prison on an unrelated charge, that the defendant admitted to the inmate that the defendant killed the victim because the victim had beaten the defendant up and taken the defendant's wallet, and that the defendant and another individual participated in the shooting, was sufficient to support the defendant's conviction for possession of a firearm during the commission of a crime based on the theory of party to a crime. Jackson v. State, 322 Ga. App. 196, 744 S.E.2d 380 (2013).

Evidence that the defendant was found in the laundry room of the home that was the subject of the home burglary; police found masks, gloves, money, a gun, and some of the victim's jewelry in or near the laundry room; and the defendant's DNA was found on one of the masks recovered supported the defendant's convictions for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Rudison v. State, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Evidence including testimony as to the gang's criminal activities, corroborating the defendant's participation in the armed robberies; the defendant's admission to participating in two murders; and a gun the defendant used in the attempted armed robbery of the first victim was

sufficient to support the defendant's convictions for criminal street gang activity, criminal attempt to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a felony. Morris v. State, 322 Ga. App. 682, 746 S.E.2d 162 (2013).

Evidence was sufficient to convict the defendant of terroristic threats, six counts of aggravated assault, and possession of a firearm during the commission of a felony because a witness testified that a vehicle fitting the description of the defendant's car was driven by the shooter who shot at the house of the complainant's mother where the complainant was staying; multiple gunshot holes were found in the side of the home; the complainant testified that, earlier that morning, the defendant had threatened to come to the house and kill the complainant; and the complainant received text messages from the defendant later that morning apologizing for what had happened. Brown v. State, 325 Ga. App. 237, 750 S.E.2d 453 (2013).

As there was evidence that the officers identified themselves as police, the defendant admitted to shooting a rifle in the direction of the officers, and there was undisputed evidence that one officer was hit, the evidence was sufficient to support the jury's guilty verdict as to four counts of possession of a firearm during the commission of a felony. Stover v. State, 324 Ga. App. 467, 751 S.E.2d 115 (2013).

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

Victim's testimony that the victim and the defendant were fighting, the defendant left the room and later returned with a gun that the defendant held to the victim's side, and the victim heard a gunshot and turned to face the defendant, who told the victim that the defendant had been meaning to do that and ran, supported the defendant's convictions for aggravated assault, aggravated battery, and possession of a firearm during the commission of a felony. Jones v. State, 326 Ga. App. 151, 756 S.E.2d 267 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, and possession of a firearm during the commission of a felony because, although the two passengers of the car committed the actual armed robbery, there was evidence that the defendant, the driver of the car, knew that the two passengers were armed and that the defendant "kind of sort of" knew what they were going to do, which supported a finding that the defendant participated in the robbery as the getaway driver. Smith v. State, 325 Ga. App. 745, 754 S.E.2d 788 (2014).

Evidence that the defendant invited the victim to physically fight the defendant after a verbal dispute arose over a dice bet, and that the victim was unarmed while the defendant had concealed a firearm in a pocket, was sufficient to defeat the defendant's justification defense and support the convictions for aggravated assault and possession of a firearm during the commission of a felon. Robinson v. State, 326 Ga. App. 59, 755 S.E.2d 865 (2014).

Evidence, including the defendant's statement to police that the defendant had shot the victim, had meant to shoot the victim, and would have shot the victim again, was sufficient to support the defendant's convictions for aggravated assault and possession of a firearm during the commission of a crime. Taylor v. State, 327 Ga. App. 288, 758 S.E.2d 629 (2014).

Application (Cont'd)

Victim's testimony that the defendant pointed a gun at the victim, gave the gun to an accomplice, and took the victim's possessions, and that the victim was 100% sure the defendant was one of the robbers was sufficient to support a conviction for possession of a firearm during the commission of a crime. Hogan v. State, 330 Ga. App. 596, 768 S.E.2d 779 (2015).

Evidence only sufficient to support one count since there was only one victim. — Defendant could not be convicted of two counts of possession of a firearm during the commission of a felony since there was only one victim. Barnes v. State, 319 Ga. App. 509, 736 S.E.2d 471 (2013).

Evidence only sufficient to support two of three counts. — Defendant could only be convicted of two of the three possession of a firearm during the commission of a crime counts because there were only two victims; thus, the defendant's third conviction involving one of the same victims had to be vacated. Bradley v. State, 292 Ga. 607, 740 S.E.2d 100 (2013).

Murder, other offenses, and possession shown.

Trial evidence authorized the defendant's conviction for possession of a firearm during the commission of drug felony offenses as the defendant had immediate access to a handgun when the defendant and a codefendant stood at the open trunk of a vehicle for approximately two or three minutes, depositing drugs in the defendant's bag, where the handgun was also located; the jury could conclude that the defendant had been within arm's reach of the handgun when the drugs and the handgun were placed together. Jackson v. State, 314 Ga. App. 272, 724 S.E.2d 9 (2012).

Robbery, other offenses, and possession shown.

Evidence was sufficient to sustain the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b), because the victim testified about the assault and identified the defendant as the person who committed the assault; the competent testimony of even a single witness can be enough to sustain a conviction. Brown v. State, 314 Ga. App. 198, 723 S.E.2d 520 (2012).

Aggravated assault and possession shown.

Based on the evidence that the defendant drove and deliberately followed the victims and pulled in behind the victims' vehicle, intentionally encouraged the shooter by telling the shooter "you better not let these guys get away, go ahead and handle your business, do what you got to do," and fled with the shooter after the shooting, the jury was authorized to conclude that the defendant was a party to the crimes of aggravated assault and possession of a firearm during the commission of a crime. Talifero v. State, 319 Ga. App. 65, 734 S.E.2d 61 (2012).

Drug offenses and possession of weapon shown.

Evidence of the quantum of marijuana seized in conjunction with the presence of the weapon and ammunition found in the bedroom the defendant ran to on being confronted by police, as well as the cell phones containing the defendant's photograph, the scholarship application in the defendant's name, the video security system, the police scanner, and the defendant's mother's pill bottle therein, linked the defendant to the marijuana and weapon. Copeland v. State, 327 Ga. App. 520, 759 S.E.2d 593 (2014).

Evidence insufficient to support conviction.

Evidence was insufficient to convict the defendant of possession of a knife during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1), based upon the length of the blade of the knife because the length of the knife's blade was less than three inches long. Brown v. State, 313 Ga. App. 907, 723 S.E.2d 115 (2012).

Because the evidence was insufficient to sustain the defendant's conviction for aggravated assault, the defendant's conviction for possession of a firearm in the commission of a felony based on the underlying felony of aggravated assault also had to be reversed. Touchstone v. State, 319 Ga. App. 477, 735 S.E.2d 805 (2012).

Driving a getaway car sufficient for conviction. — Trial court had sufficient evidence to convict a defendant of armed robbery and possession of a firearm during the commission of a crime as a party to those crimes by aiding and abetting, pursuant to O.C.G.A. § 16-2-20, given evidence that the defendant helped plan the robberies of two game rooms, drove the getaway vehicle, and participated in the division of the proceeds. Norman v. State, 311 Ga. App. 721, 716 S.E.2d 805 (2011).

Jury Instructions

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

Punishment

Sentence not cruel and unusual punishment. — Defendant's sentences of 20 years in confinement for the aggravated assault on the deceased victim, followed by 20 years for the aggravated assault on the second victim (with five years in confinement and the remainder on probation), followed by an additional 15 years of probation for the charge of participation in criminal street gang activity and another five years' probation for the possession of a firearm during the commission of a felony, to run consecutively to the other sentences, were within the statutory range for those crimes, and did not constitute cruel and unusual punishment. Taylor v. State, 331 Ga. App. 577, 771 S.E.2d 224 (2015).

Merger not appropriate. — Trial court did not err in failing to merge defendant's two convictions on possession of a firearm during the commission of a crime as the crime involved two victims and two separate weapons. Williams v. State, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

Failure to merge offense.

Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with that for use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

Sentence exceeded statutory maximum. — Trial court's sentence of the defendant to life imprisonment for possession of a firearm during the commission of a felony was vacated because the sentence far exceeded the statutory maximum term-of-years sentence under O.C.G.A. § 16-11-106. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

Motion to withdraw guilty plea.

Trial court did not err in denying the defendant's motion to withdraw the guilty plea to armed robbery, O.C.G.A. § 16-8-41(a), aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), cruelty to children in the first degree, O.C.G.A. § 16-5-70(b), and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b)(1), because the state met the state's burden of showing that the defendant understood the constitutional rights the defendant was giving up by pleading guilty, that the defendant understood that since the plea was non-negotiated, the trial court would sentence the defendant to at least ten years imprisonment and could sentence the defendant to a maximum sentence of life in prison, and that the defendant knowingly and voluntarily entered the guilty plea in order to avoid a trial on the indicted charges. Carson v. State, 314 Ga. App. 225, 723 S.E.2d 516 (2012), overruled on other grounds.

Sentence improper. — Sentence imposed upon the defendant for possession of a firearm during the commission of a felony was improper because the sentence would require that before the defendant began the sentence for possession of a firearm during the commission of a felony, the defendant had to serve the sentence for the underlying felony of armed robbery and then the sentence for aggravated as-

Punishment (Cont'd)

sault, which was not set forth as an underlying felony. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012).

Trial court imposed a sentence that the law did not allow for unlawful possession of a firearm during the commission of a felony when the court sentenced the defendant to 15 years because O.C.G.A. § 16-11-106 only authorized five to ten years. Threatt v. State, 293 Ga. 549, 748 S.E.2d 400 (2013).

Separate sentences for possession during aggravated assault and burglary proper. — Firearm possession counts predicated on aggravated assault and burglary were properly subject to separate sentences because O.C.G.A. § 16-11-106 permitted one firearm possession conviction as to each victim in a criminal transaction under paragraph (b)(1) as well as an additional conviction for firearm possession during the commission of the crimes enumerated in paragraphs (b)(2) through (b)(5), and burglary fell within paragraph (b)(2). Favors v. State, 770 S.E.2d 851, No. S14A1797, 2015 Ga. LEXIS 196 (2015).

16-11-107. Harming a law enforcement animal.

(a) As used in this Code section, the term:

(1) "Accelerant detection dog" means a dog trained to detect hydrocarbon substances.

(2) "Bomb detection dog" means a dog trained to locate bombs or explosives by scent.

(2.1) "Dangerous weapon" shall have the same meaning as provided for in Code Section 16-11-121.

(2.2) "Firearm" means any handgun, rifle, shotgun, stun gun, taser, or dangerous weapon.

(3) "Firearms detection dog" means a dog trained to locate firearms by scent.

(3.1) "Knowingly" means having knowledge that an animal is a law enforcement animal.

(3.2) "Law enforcement animal" means a police dog, police horse, or any other animal trained to support a peace officer, fire department, or the state fire marshal in performance of law enforcement duties.

(4) "Narcotic detection dog" means a dog trained to locate narcotics by scent.

(5) "Narcotics" means any controlled substance as defined in paragraph (4) of Code Section 16-13-21 and shall include marijuana as defined by paragraph (16) of Code Section 16-13-21.

(6) "Patrol dog" means a dog trained to protect a peace officer and to apprehend or hold without excessive force a person in violation of the criminal statutes of this state.

(6.1) "Performance of its duties" means performing law enforcement, fire department, or state fire marshal duties as trained.

(7) "Police dog" means a bomb detection dog, a firearms detection dog, a narcotic detection dog, a patrol dog, an accelerant detection dog, or a tracking dog used by a law enforcement agency. Such term also means a search and rescue dog.

(8) "Police horse" means a horse trained to transport, carry, or be ridden by a law enforcement officer and used by a law enforcement agency.

(8.1) "Search and rescue dog" means any dog that is owned or the services of which are employed by a fire department or the state fire marshal for the principal purpose of aiding in the detection of missing persons, including but not limited to persons who are lost, who are trapped under debris as a result of a natural or manmade disaster, or who are drowning victims.

(9) "Tracking dog" means a dog trained to track and find a missing person, escaped inmate, or fleeing felon.

(b) A person commits the offense of harming a law enforcement animal in the fourth degree when he or she knowingly and intentionally causes physical harm to such law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a misdemeanor of a high and aggravated nature and, upon conviction thereof, shall be punished by imprisonment not to exceed 12 months, a fine not to exceed $5,000.00, or both.

(c) A person commits the offense of harming a law enforcement animal in the third degree when he or she knowingly and intentionally and with a deadly weapon causes, or with any object, device, instrument, or body part which, when used offensively against such law enforcement animal, is likely to or actually does cause, serious physical injury to such law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a misdemeanor of a high and aggravated nature and, upon conviction thereof, shall be punished by imprisonment for not less than six nor more than 12 months, a fine not to exceed $5,000.00, or both.

(d) A person commits the offense of harming a law enforcement animal in the second degree when he or she knowingly and intentionally shoots a law enforcement animal with a firearm or causes debilitating physical injury to a law enforcement animal while such law

enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, a fine not to exceed $25,000.00, or both.

(e) A person commits the offense of harming a law enforcement animal in the first degree when he or she knowingly and intentionally causes the death of a law enforcement animal while such law enforcement animal is in performance of its duties or because of such law enforcement animal's performance of its duties. Any person convicted of a violation of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than 18 months nor more than five years, a fine not to exceed $50,000.00, or both.

(f) In addition to any other penalty provided for under this Code section, any person convicted of a violation under this Code section shall pay restitution to the law enforcement agency, fire department, or the state fire marshal which is the owner of, or which owned, such law enforcement animal in the amount of associated veterinary expenses incurred in the treatment of such law enforcement animal pursuant to Article 1 of Chapter 14 of Title 17; provided, however, that if such law enforcement animal died or is no longer able to engage in performance of its duties as a result of a violation of this Code section, the amount paid in restitution shall additionally include the amount of the actual replacement value of the law enforcement animal, which shall include the value of an animal to replace the law enforcement animal and all costs associated with training such animal and its handler or handlers.

(g) Nothing in this Code section shall prohibit the killing or euthanasia of a law enforcement animal for humane purposes.

(h) Nothing in this Code section shall prohibit the defense of a person against a law enforcement animal that attacks such person without or in spite of commands given by its handler.

(i) The Division of Forensic Sciences of the Georgia Bureau of Investigation shall perform forensic pathology services upon any law enforcement animal whose death occurred while in performance of its duties or because of such law enforcement animal's performance of its duties. (Code 1981, § 16-11-107, enacted by Ga. L. 1983, p. 528, § 1; Ga. L. 1996, p. 370, § 1; Ga. L. 1996, p. 778, § 1; Ga. L. 1998, p. 657, § 1.2; Ga. L. 2015, p. 203, § 3-3/SB 72.)

The 2015 amendment, effective July 1, 2015, added paragraphs (a)(2.1), (a)(2.2), (a)(3.1), (a)(3.2), and (a)(6.1); substituted "Such term also" for "'Police dog' also" at the beginning of the last sentence of paragraph (a)(7); deleted former subsec-

tion (b), which read: "Any person who knowingly and intentionally destroys or causes serious or debilitating physical injury to a police dog or police horse, knowing said dog to be a police dog or said horse to be a police horse, shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, or a fine not to exceed $10,000.00, or both. This subsection shall not apply to the destruction of a police dog or police horse for humane purposes."; and added subsections (b) through (i).

Editor's notes. — Ga. L. 2015, p. 203, § 3-1/SB 72, not codified by the General Assembly, provides that: "This part of this Act shall be known and may be cited as 'Tanja's Law.'"

16-11-107.1. Harassment of assistance dog by humans or other dogs; penalty.

Law reviews. — For comment, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," see 63 Emory L.J. 1163 (2014).

Part 3

Carrying and Possession of Firearms

16-11-125.1. Definitions.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-126. Having or carrying handguns, long guns, or other weapons; license requirement; exceptions for homes, motor vehicles, private property, and other locations and conditions.

(a) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a weapon or long gun on his or her property or inside his or her home, motor vehicle, or place of business without a valid weapons carry license.

(b) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a long gun without a valid weapons carry license, provided that if the long gun is loaded, it shall only be carried in an open and fully exposed manner.

(c) Any person who is not prohibited by law from possessing a handgun or long gun may have or carry any handgun provided that it is enclosed in a case and unloaded.

(d) Any person who is not prohibited by law from possessing a handgun or long gun who is eligible for a weapons carry license may transport a handgun or long gun in any private passenger motor vehicle; provided, however, that private property owners or persons in legal control of private property through a lease, rental agreement,

licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135.

(e) Any person licensed to carry a handgun or weapon in any other state whose laws recognize and give effect to a license issued pursuant to this part shall be authorized to carry a weapon in this state, but only while the licensee is not a resident of this state; provided, however, that such licensee shall carry the weapon in compliance with the laws of this state.

(f) Any person with a valid hunting or fishing license on his or her person, or any person not required by law to have a hunting or fishing license, who is engaged in legal hunting, fishing, or sport shooting when the person has the permission of the owner of the land on which the activities are being conducted may have or carry on his or her person a handgun or long gun without a valid weapons carry license while hunting, fishing, or engaging in sport shooting.

(g) Notwithstanding Code Sections 12-3-10, 27-3-1.1, 27-3-6, and 16-12-122 through 16-12-127, any person with a valid weapons carry license may carry a weapon in all parks, historic sites, or recreational areas, as such term is defined in Code Section 12-3-10, including all publicly owned buildings located in such parks, historic sites, and recreational areas, in wildlife management areas, and on public transportation; provided, however, that a person shall not carry a handgun into a place where it is prohibited by federal law.

(h)(1) No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided in subsections (a) through (g) of this Code section.

(2) A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

(i) Upon conviction of the offense of carrying a weapon without a valid weapons carry license, a person shall be punished as follows:

(1) For the first offense, he or she shall be guilty of a misdemeanor; and

(2) For the second offense within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, and for any subsequent offense, he or she shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than two years and not more than five years.

(j) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Laws 1837, Cobb's 1851 Digest, pp. 848, 849; Ga. L. 1851-52, p. 269, §§ 1-3; Code 1863, § 4413; Ga. L. 1865-66, p. 233, §§ 1, 2; Code 1868, § 4454; Code 1873, § 4527; Ga. L. 1882-83, p. 48, § 1; Code 1882, § 4527; Ga. L. 1898, p. 60, § 1; Penal Code 1895, § 341; Penal Code 1910, § 347; Code 1933, § 26-5101; Code 1933, § 26-2901, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1992, p. 6, § 16; Ga. L. 1996, p. 108, § 1; Ga. L. 1998, p. 1153, § 1; Ga. L. 2000, p. 1630, § 3; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2008, p. 1199, § 3/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 963, § 1-2/SB 308; Ga. L. 2014, p. 599, § 1-4/HB 60; Ga. L. 2015, p. 805, § 2/HB 492.)

The 2014 amendment, effective July 1, 2014, in subsection (d), inserted "private" in three places, substituted "right to exclude or eject a person who is in" for "right to forbid", and inserted "in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21" near the end.

The 2015 amendment, effective July 1, 2015, added subsection (j).

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Charge did not omit nexus between violence and gang activity. — With regard to the defendant's convictions for aggravated assault and gang-related crimes, the trial court did not commit plain error with regard to the court's jury instructions because the trial court correctly stated the law by using the statutory language in the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-4(a), in the court's charge to the jury, so the charge did not omit a nexus between the violence, and it was not possible for the jury to convict the defendant without finding that nexus. Skinner v. State, 318 Ga. App. 217, 733 S.E.2d 506 (2012).

Gun license applicant's retention of weapon. — Given a gun license applicant's criminal history and the fact that the applicant retained the right to possess a handgun in the applicant's own home, vehicle, or business under O.C.G.A. § 16-11-126, intermediate scrutiny was applied to the applicant's claim that O.C.G.A. § 16-11-129, regulating public carrying, was unconstitutional as applied to the applicant. Hertz v. Bennett, 294 Ga. 62, 751 S.E.2d 90 (2013).

Evidence sufficient for conviction. Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the

General Consideration (Cont'd) victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

16-11-127. Carrying weapons in unauthorized locations.

(a) As used in this Code section, the term:

(1) "Courthouse" means a building occupied by judicial courts and containing rooms in which judicial proceedings are held.

(2) "Government building" means:

(A) The building in which a government entity is housed;

(B) The building where a government entity meets in its official capacity; provided, however, that if such building is not a publicly owned building, such building shall be considered a government building for the purposes of this Code section only during the time such government entity is meeting at such building; or

(C) The portion of any building that is not a publicly owned building that is occupied by a government entity.

(3) "Government entity" means an office, agency, authority, department, commission, board, body, division, instrumentality, or institution of the state or any county, municipal corporation, consolidated government, or local board of education within this state.

(4) "Parking facility" means real property owned or leased by a government entity, courthouse, jail, prison, or place of worship that has been designated by such government entity, courthouse, jail, prison, or place of worship for the parking of motor vehicles at a government building or at such courthouse, jail, prison, or place of worship.

(b) Except as provided in Code Section 16-11-127.1 and subsection (d) or (e) of this Code section, a person shall be guilty of carrying a weapon or long gun in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while:

(1) In a government building as a nonlicense holder;

(2) In a courthouse;

(3) In a jail or prison;

(4) In a place of worship, unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders;

(5) In a state mental health facility as defined in Code Section 37-1-1 which admits individuals on an involuntary basis for treatment of mental illness, developmental disability, or addictive disease;

provided, however, that carrying a weapon or long gun in such location in a manner in compliance with paragraph (3) of subsection (d) of this Code section shall not constitute a violation of this subsection;

(6) On the premises of a nuclear power facility, except as provided in Code Section 16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall supersede the punishment provisions of this Code section; or

(7) Within 150 feet of any polling place when elections are being conducted and such polling place is being used as a polling place as provided for in paragraph (27) of Code Section 21-2-2, except as provided in subsection (i) of Code Section 21-2-413.

(c) A license holder or person recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) or prohibited by subsection (e) of this Code section; provided, however, that private property owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages.

(d) Subsection (b) of this Code section shall not apply:

(1) To the use of weapons or long guns as exhibits in a legal proceeding, provided such weapons or long guns are secured and handled as directed by the personnel providing courtroom security or the judge hearing the case;

(2) To a license holder who approaches security or management personnel upon arrival at a location described in subsection (b) of this Code section and notifies such security or management personnel of the presence of the weapon or long gun and explicitly follows the security or management personnel's direction for removing, securing, storing, or temporarily surrendering such weapon or long gun; and

(3) To a weapon or long gun possessed by a license holder which is under the possessor's control in a motor vehicle or is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle and such vehicle is parked in a parking facility.

(e)(1) A license holder shall be authorized to carry a weapon in a government building when the government building is open for

business and where ingress into such building is not restricted or screened by security personnel. A license holder who enters or attempts to enter a government building carrying a weapon where ingress is restricted or screened by security personnel shall be guilty of a misdemeanor if at least one member of such security personnel is certified as a peace officer pursuant to Chapter 8 of Title 35; provided, however, that a license holder who immediately exits such building or immediately leaves such location upon notification of his or her failure to clear security due to the carrying of a weapon shall not be guilty of violating this subsection or paragraph (1) of subsection (b) of this Code section. A person who is not a license holder and who attempts to enter a government building carrying a weapon shall be guilty of a misdemeanor.

(2) Any license holder who violates subsection (b) of this Code section in a place of worship shall not be arrested but shall be fined not more than $100.00. Any person who is not a license holder who violates subsection (b) of this Code section in a place of worship shall be punished as for a misdemeanor.

(f) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Ga. L. 1870, p. 421, §§ 1, 2; Ga. L. 1878-79, p. 64, § 1; Code 1882, § 4528; Penal Code 1895, § 342; Ga. L. 1909, p. 90, § 1; Penal Code 1910, § 348; Code 1933, § 26-5102; Code 1933, § 26-2902, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 2; Ga. L. 1986, p. 673, § 1; Ga. L. 1987, p. 358, § 1; Ga. L. 1992, p. 1315, § 1; Ga. L. 1996, p. 748, § 11; Ga. L. 1997, p. 514, § 1; Ga. L. 2003, p. 423, § 1; Ga. L. 2008, p. 1199, § 4/HB 89; Ga. L. 2010, p. 963, § 1-3/SB 308; Ga. L. 2014, p. 432, § 2-5/HB 826; Ga. L. 2014, p. 599, § 1-5/HB 60; Ga. L. 2015, p. 805, § 3/HB 492.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, substituted "Except as provided in Code Section 16-11-127.1 and subsection (d) of this Code section, a" for "A" at the beginning of subsection (b), and substituted "A license" for "Except as provided in Code Section 16-11-127.1, a" at the beginning of subsection (c). The second 2014 amendment, effective July 1, 2014, in subsection (a), deleted former paragraph (a)(1), which read: "'Bar' means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.", redesignated former paragraphs (a)(2) through (a)(5) as present paragraphs (a)(1) through (a)(4), respectively, and, in paragraph (a)(4), inserted "or" three times and deleted ", or bar" following "worship" three times; in subsection (b), substituted "Except as provided in subsection (d) or (e) of this Code section, a" for "A" at the beginning of the introductory paragraph, added ", unless the governing body or authority of the place of worship permits the carrying of weapons or long guns by license holders" at the end of paragraph (b)(4), deleted former paragraph (b)(6), which read: "In a bar, unless the owner of the bar permits the carrying of weapons or long guns by license holders;", and redes-

ignated former paragraphs (b)(7) and (b)(8) as present paragraphs (b)(6) and (b)(7), respectively; in subsection (c), inserted "private" in three places, in the first sentence, inserted "or prohibited by subsection (e)" near the middle, substituted "right to exclude or eject a person who is in" for "right to forbid", and inserted "in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21"; and added subsection (e).

The 2015 amendment, effective July 1, 2015, added "as a nonlicense holder" at the end of paragraph (b)(1); inserted "when elections are being conducted and such polling place is being used as a polling place as provided for in paragraph (27) of Code Section 21-2-2" in the middle of paragraph (b)(7); and added subsection (f).

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Statutory construction of "notwithstanding" under former provisions of subsection (e) of this section. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, they argued unsuccessfully that the "notwithstanding" language of HB 89, codified at O.C.G.A. § 16-11-127, which authorized Georgia firearms license (GFL) holders to carry firearms in public transportation notwithstanding O.C.G.A. §§ 16-12-122 through 16-12-127, which is the Transportation Passenger Safety Act (TPSA), would be superfluous unless it was intended to make clear that a GFL holder could carry a firearm in an airport. They misleadingly focused only on O.C.G.A. § 16-12-127, but the "notwithstanding" language in HB 89 referred to all of the TPSA, and O.C.G.A. § 16-12-123(b), another section of the TPSA, prohibited boarding any bus or rail vehicle with a firearm; since public transportation included bus and rail vehicles such as those operated by Metropolitan Atlanta Rapid Transit Authority, the "notwithstanding" language was needed to make clear that GFL holders could carry firearms onto such vehicles notwithstanding the TPSA. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

Application of federal law. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, they argued unsuccessfully that if HB 89, codified as O.C.G.A. § 16-11-127 did not apply to airports, then the exception for carrying firearms into a place prohibited by federal law was superfluous. The federal law exception applied to all of the places listed in HB 89, including parks, historic sites, and recreational and wildlife management areas, as well as public transportation. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

Application to airports. — In a case in which a gun rights organization and a Georgia state representative sought declaratory and injunctive relief because they asserted that Georgia House Bill (HB) 89 permitted any person who possessed a valid Georgia firearms license to carry a firearm in the non-sterile areas of the Hartsfield-Jackson Atlanta International Airport, giving the terms of the statute their ordinary signification, the public transportation provision of HB 89, as codified at O.C.G.A. § 16-11-127, did

not apply to airports. HB 89 did not mention airports, nor did the bill define public transportation, and the ordinary signification of public transportation did not include airports. GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008), aff'd, 318 Fed. Appx. 851 (11th Cir. 2009).

Application to places of worship. — When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their First Amendment right to the free exercise of religion, because § 16-11-127(d)(2) only required leaving guns in vehicles or notifying security or management and following directions for securing guns under § 16-11-127(d)(2) and (3), it was not an unmistakable pressure to forego religious precepts or pressure religious conduct to trigger scrutiny under the First Amendment's Free Exercise Clause and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127(b)(4), regulating possession of weapons in a place of worship, violated their Second Amendment right to bear arms, the court noted that the United States Supreme Court, in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783 (2008), held that the Second Amendment protected a right to possess and carry weapons for self defense but did not elaborate on what all the "sensitive" places were to which a regulation could prohibit carrying a weapon, and absent clearer guidance, the safer approach was to assume that possession at a place of worship was within the Second Amendment guarantee and apply intermediate scrutiny, and since prohibiting firearms in a place of worship bore a substantial relationship to the important goal of protecting religious freedom by protecting attendees from the fear or threat of intimidation or armed attack, § 16-11-127(b)(4) passed intermediate scrutiny and the claim against defendants, the State of Georgia, the Governor, a county, and a county manager failed. GeorgiaCarry.Org, Inc. v. Georgia, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

That plaintiff gun owners "would like" to carry a gun to be able to act in "self-defense" was a personal preference, motivated by a secular purpose, and there was no First Amendment protection for personal preferences or secular beliefs, thus, a First Amendment Free Exercise claim challenging Georgia's "Carry Law," O.C.G.A. § 16-11-127(b), which banned carrying guns in a place of worship, failed. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

16-11-127.1. Carrying weapons within school safety zones, at school functions, or on a bus or other transportation furnished by a school.

(a) As used in this Code section, the term:

(1) "Bus or other transportation furnished by a school" means a bus or other transportation furnished by a public or private elementary or secondary school.

(2) "School function" means a school function or related activity that occurs outside of a school safety zone and is for a public or private elementary or secondary school.

(3) "School safety zone" means in or on any real property or building owned by or leased to:

(A) Any public or private elementary school, secondary school, or local board of education and used for elementary or secondary education; and

(B) Any public or private technical school, vocational school, college, university, or other institution of postsecondary education.

(4) "Weapon" means and includes any pistol, revolver, or any weapon designed or intended to propel a missile of any kind, or any dirk, bowie knife, switchblade knife, ballistic knife, any other knife having a blade of two or more inches, straight-edge razor, razor blade, spring stick, knuckles, whether made from metal, thermoplastic, wood, or other similar material, blackjack, any bat, club, or other bludgeon-type weapon, or any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as a nun chahka, nun chuck, nunchaku, shuriken, or fighting chain, or any disc, of whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart, or any weapon of like kind, and any stun gun or taser as defined in subsection (a) of Code Section 16-11-106. This paragraph excludes any of these instruments used for classroom work authorized by the teacher.

(b)(1) Except as otherwise provided in subsection (c) of this Code section, it shall be unlawful for any person to carry to or to possess or have under such person's control while within a school safety zone, at a school function, or on a bus or other transportation furnished by a school any weapon or explosive compound, other than fireworks or consumer fireworks the possession of which is regulated by Chapter 10 of Title 25.

(2) Any license holder who violates this subsection shall be guilty of a misdemeanor. Any person who is not a license holder who violates this subsection shall be guilty of a felony and, upon conviction thereof, be punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor more than ten years, or both.

(3) Any person convicted of a violation of this subsection involving a dangerous weapon or machine gun, as such terms are defined in Code Section 16-11-121, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a period of not less than five nor more than ten years, or both.

(4) A child who violates this subsection may be subject to the provisions of Code Section 15-11-601.

(c) The provisions of this Code section shall not apply to:

(1) Baseball bats, hockey sticks, or other sports equipment possessed by competitors for legitimate athletic purposes;

(2) Participants in organized sport shooting events or firearm training courses;

(3) Persons participating in military training programs conducted by or on behalf of the armed forces of the United States or the Georgia Department of Defense;

(4) Persons participating in law enforcement training conducted by a police academy certified by the Georgia Peace Officer Standards and Training Council or by a law enforcement agency of the state or the United States or any political subdivision thereof;

(5) The following persons, when acting in the performance of their official duties or when en route to or from their official duties:

(A) A peace officer as defined by Code Section 35-8-2;

(B) A law enforcement officer of the United States government;

(C) A prosecuting attorney of this state or of the United States;

(D) An employee of the Department of Corrections or a correctional facility operated by a political subdivision of this state or the United States who is authorized by the head of such department or correctional agency or facility to carry a firearm;

(E) An employee of the Department of Community Supervision who is authorized by the commissioner of community supervision to carry a firearm;

(F) A person employed as a campus police officer or school security officer who is authorized to carry a weapon in accordance with Chapter 8 of Title 20; and

(G) Medical examiners, coroners, and their investigators who are employed by the state or any political subdivision thereof;

(6) A person who has been authorized in writing by a duly authorized official of a public or private elementary or secondary school or a public or private technical school, vocational school, college, university, or other institution of postsecondary education or a local board of education as provided in Code Section 16-11-130.1 to have in such person's possession or use within a school safety zone, at a school function, or on a bus or other transportation furnished by a school a weapon which would otherwise be prohibited by this Code section. Such authorization shall specify the weapon or weapons which have been authorized and the time period during which the authorization is valid;

(7) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student within a school safety

zone, at a school function, or on a bus or other transportation furnished by a school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10 when he or she has any weapon legally kept within a vehicle when such vehicle is parked within a school safety zone or is in transit through a designated school safety zone;

(8) A weapon possessed by a license holder which is under the possessor's control in a motor vehicle or which is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle which is being used by an adult over 21 years of age to bring to or pick up a student within a school safety zone, at a school function, or on a bus or other transportation furnished by a school, or when such vehicle is used to transport someone to an activity being conducted within a school safety zone which has been authorized by a duly authorized official or local board of education as provided by paragraph (6) of this subsection; provided, however, that this exception shall not apply to a student attending a public or private elementary or secondary school;

(9) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(10) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon;

(11) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon;

(12) Community supervision officers employed by and under the authority of the Department of Community Supervision when specifically designated and authorized in writing by the commissioner of community supervision;

(13) Public safety directors of municipal corporations;

(14) State and federal trial and appellate judges;

(15) United States attorneys and assistant United States attorneys;

(16) Clerks of the superior courts;

(17) Teachers and other personnel who are otherwise authorized to possess or carry weapons, provided that any such weapon is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle; or

(18) Constables of any county of this state.

(d)(1) This Code section shall not prohibit any person who resides or works in a business or is in the ordinary course transacting lawful business or any person who is a visitor of such resident located within a school safety zone from carrying, possessing, or having under such person's control a weapon within a school safety zone; provided, however, that it shall be unlawful for any such person to carry, possess, or have under such person's control while at a school building or school function or on school property or a bus or other transportation furnished by a school any weapon or explosive compound, other than fireworks the possession of which is regulated by Chapter 10 of Title 25.

(2) Any person who violates this subsection shall be subject to the penalties specified in subsection (b) of this Code section.

(e) It shall be no defense to a prosecution for a violation of this Code section that:

(1) School was or was not in session at the time of the offense;

(2) The real property was being used for other purposes besides school purposes at the time of the offense; or

(3) The offense took place on a bus or other transportation furnished by a school.

(f) In a prosecution under this Code section, a map produced or reproduced by any municipal or county agency or department for the purpose of depicting the location and boundaries of the area of the real property of a school board or a private or public elementary or secondary school that is used for school purposes or the area of any public or private technical school, vocational school, college, university, or other institution of postsecondary education, or a true copy of the map, shall, if certified as a true copy by the custodian of the record, be admissible and shall constitute prima-facie evidence of the location and boundaries of the area, if the governing body of the municipality or county has approved the map as an official record of the location and boundaries of the area. A map approved under this Code section may be revised from time to time by the governing body of the municipality or county. The original of every map approved or revised under this subsection or a true copy of such original map shall be filed with the municipality or county and shall be maintained as an official record of the municipality or county. This subsection shall not preclude the prosecution from introducing or relying upon any other evidence or testimony to establish any element of this offense. This subsection shall not preclude the use or admissibility of a map or diagram other than the one which has been approved by the municipality or county.

(g) A county school board may adopt regulations requiring the posting of signs designating the areas of school boards and private or public elementary and secondary schools as "Weapon-free and Violence-free School Safety Zones."

(h) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Code 1981, § 16-11-127.1, enacted by Ga. L. 1992, p. 1315, § 2; Ga. L. 1994, p. 543, § 1; Ga. L. 1994, p. 547, § 1; Ga. L. 1994, p. 1012, § 4; Ga. L. 1995, p. 10, § 16; Ga. L. 1999, p. 362, § 1; Ga. L. 2000, p. 20, § 6; Ga. L. 2000, p. 1630, § 4; Ga. L. 2003, p. 140, § 16; Ga. L. 2008, p. 533, § 3/SB 366; Ga. L. 2008, p. 1199, § 5/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 463, § 2/SB 299; Ga. L. 2010, p. 963, § 1-4/SB 308; Ga. L. 2013, p. 294, § 4-10/HB 242; Ga. L. 2014, p. 432, § 1-1/HB 826; Ga. L. 2014, p. 599, § 1-6/HB 60; Ga. L. 2015, p. 5, § 16/HB 90; Ga. L. 2015, p. 274, § 1/HB 110; Ga. L. 2015, p. 422, § 5-27/HB 310; Ga. L. 2015, p. 805, § 4/HB 492.)

The 2013 amendment, effective January 1, 2014, substituted "Code Section 15-11-601" for "Code Section 15-11-63" in paragraph (b)(4). See editor's note for applicability.

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, rewrote this Code section. The second 2014 amendment, effective July 1, 2014, rewrote this Code section. See the Code Commission note regarding the effect of these amendments.

The 2015 amendments. — The first 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, substituted "within a school safety zone, at a school function" for "within a school safety zone or at a school function" near the middle of paragraph (b)(1). The second 2015 amendment, effective July 1, 2015, in paragraph (b)(1), substituted "within a school safety zone, at a school function" for "within a school safety zone or at a school function" near the middle and inserted "or consumer fireworks" near the end. The third 2015 amendment, effective July 1, 2015, in subparagraph (c)(5)(D), deleted "Georgia" preceding "Department of Corrections" near the beginning and inserted "department or" near the end; added present subparagraph (c)(5)(E); redesignated former subparagraphs (c)(5)(E) and (c)(5)(F) as present subparagraphs (c)(5)(F) and (c)(5)(G), respectively; and substituted the present provisions of paragraph (c)(12) for the former provisions, which read: "Probation supervisors employed by and under the authority of the Department of Corrections pursuant to Article 2 of Chapter 8 of Title 42, known as the 'State-wide Probation Act,' when specifically designated and authorized in writing by the director of the Division of Probation;". See editor's note for applicability. The fourth 2015 amendment, effective July 1, 2015, added subsection (h).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the amendment of this Code section by Ga. L. 2014, p. 432, § 1-1/HB826, was treated as impliedly repealed and superseded by Ga. L. 2014, p. 599, § 1-6/HB 60, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The

enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For article, "State v. Jackson and the Explosion of Liability for Felony Murder," see 62 Mercer L. Rev. 1335 (2011). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Findings in disposition order must be in writing. — Trial court erred by ordering a juvenile into restrictive custody under O.C.G.A. § 15-11-63 after failing to make specific written findings of fact in the court's disposition order and, instead, relying on boilerplate text that the court had considered the necessary factors following the juvenile's delinquency adjudication for violating O.C.G.A. § 16-11-127.1(b)(1) for possession of a weapon in a school zone. In the Interest of J.X.B., 317 Ga. App. 492, 731 S.E.2d 381 (2012).

16-11-127.2. Weapons on premises of nuclear power facility.

(a) Except as provided in subsection (c) of this Code section, it shall be unlawful for any person to carry, possess, or have under such person's control while on the premises of a nuclear power facility a weapon or long gun. Any person who violates this subsection shall be guilty of a misdemeanor.

(b) Any person who violates subsection (a) of this Code section with the intent to do bodily harm on the premises of a nuclear power facility shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor more than 20 years, or both.

(c) This Code section shall not apply to a security officer authorized to carry dangerous weapons pursuant to Code Section 16-11-124 who is acting in connection with his or her official duties on the premises of a federally licensed nuclear power facility; nor shall this Code section apply to persons designated in paragraph (2), (3), (4), or (8) of subsection (c) of Code Section 16-11-127.1.

(d) Nothing in this Code section shall in any way operate or be construed to affect, repeal, or limit the exemptions provided for under Code Section 16-11-130. (Code 1981, § 16-11-127.2, enacted by Ga. L. 2006, p. 812, § 2/SB 532; Ga. L. 2007, p. 47, § 16/SB 103; Ga. L. 2010, p. 963, § 1-5/SB 308; Ga. L. 2014, p. 432, § 2-6/HB 826; Ga. L. 2015, p. 805, § 5/HB 492.)

The 2014 amendment, effective July 1, 2014, substituted "paragraph (2), (3), (4), or (8)" for "paragraph (3), (4), (5), or (9)" near the end of subsection (c).

The 2015 amendment, effective July 1, 2015, added subsection (d).

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-129. Weapons carry license; temporary renewal permit; mandamus; verification of license.

(a) **Application for weapons carry license or renewal license; term.** The judge of the probate court of each county shall, on application under oath, on payment of a fee of $30.00, and on investigation of applicant pursuant to subsections (b) and (d) of this Code section, issue a weapons carry license or renewal license valid for a period of five years to any person whose domicile is in that county or who is on active duty with the United States armed forces and who is not a domiciliary of this state but who either resides in that county or on a military reservation located in whole or in part in that county at the time of such application. Such license or renewal license shall authorize that person to carry any weapon in any county of this state notwithstanding any change in that person's county of residence or state of domicile. Applicants shall submit the application for a weapons carry license or renewal license to the judge of the probate court on forms prescribed and furnished free of charge to persons wishing to apply for the license or renewal license. An application shall be considered to be for a renewal license if the applicant has a weapons carry license or renewal license with 90 or fewer days remaining before the expiration of such weapons carry license or renewal license or 30 or fewer days since the expiration of such weapons carry license or renewal license regardless of the county of issuance of the applicant's expired or expiring weapons carry license or renewal license. An applicant who is not a United States citizen shall provide sufficient personal identifying data, including without limitation his or her place of birth and United States issued alien or admission number, as the Georgia Bureau of Investigation may prescribe by rule or regulation. An applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y). Forms shall be designed to elicit information from the applicant pertinent to his or her eligibility under this Code section, including citizenship, but shall not require data which is nonpertinent or irrelevant, such as serial numbers or other identification capable of being used as a de facto registration of firearms owned by the applicant. The Department of Public Safety shall furnish application forms and license forms required by this Code section. The forms shall be furnished to each judge of each probate court within this state at no cost.

(b) **Licensing exceptions.**

(1) As used in this subsection, the term:

(A) "Armed forces" means active duty or a reserve component of the United States Army, United States Navy, United States Marine Corps, United States Coast Guard, United States Air Force, United States National Guard, Georgia Army National Guard, or Georgia Air National Guard.

(B) "Controlled substance" means any drug, substance, or immediate precursor included in the definition of controlled substances in paragraph (4) of Code Section 16-13-21.

(C) "Convicted" means an adjudication of guilt. Such term shall not include an order of discharge and exoneration pursuant to Article 3 of Chapter 8 of Title 42.

(D) "Dangerous drug" means any drug defined as such in Code Section 16-13-71.

(2) No weapons carry license shall be issued to:

(A) Any person younger than 21 years of age unless he or she:

(i) Is at least 18 years of age;

(ii) Provides proof that he or she has completed basic training in the armed forces of the United States; and

(iii) Provides proof that he or she is actively serving in the armed forces of the United States or has been honorably discharged from such service;

(B) Any person who has been convicted of a felony by a court of this state or any other state; by a court of the United States, including its territories, possessions, and dominions; or by a court of any foreign nation and has not been pardoned for such felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitution or laws of such state or nation;

(C) Any person against whom proceedings are pending for any felony;

(D) Any person who is a fugitive from justice;

(E) Any person who is prohibited from possessing or shipping a firearm in interstate commerce pursuant to subsections (g) and (n) of 18 U.S.C. Section 922;

(F) Any person who has been convicted of an offense arising out of the unlawful manufacture or distribution of a controlled substance or other dangerous drug;

(G) Any person who has had his or her weapons carry license revoked pursuant to subsection (e) of this Code section within three years of the date of his or her application;

(H) Any person who has been convicted of any of the following:

(i) Carrying a weapon without a weapons carry license in violation of Code Section 16-11-126; or

(ii) Carrying a weapon or long gun in an unauthorized location in violation of Code Section 16-11-127

and has not been free of all restraint or supervision in connection therewith and free of any other conviction for at least five years immediately preceding the date of the application;

(I) Any person who has been convicted of any misdemeanor involving the use or possession of a controlled substance and has not been free of all restraint or supervision in connection therewith or free of:

(i) A second conviction of any misdemeanor involving the use or possession of a controlled substance; or

(ii) Any conviction under subparagraphs (E) through (G) of this paragraph

for at least five years immediately preceding the date of the application;

(J) Except as provided for in subsection (b.1) of this Code section, any person who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within the five years immediately preceding the application. The judge of the probate court may require any applicant to sign a waiver authorizing any mental hospital or treatment center to inform the judge whether or not the applicant has been an inpatient in any such facility in the last five years and authorizing the superintendent of such facility to make to the judge a recommendation regarding whether the applicant is a threat to the safety of others and whether a license to carry a weapon should be issued. When such a waiver is required by the judge, the applicant shall pay a fee of $3.00 for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or the Department of Behavioral Health and Developmental Disabilities, which the judge shall remit to the hospital, center, or department. The judge shall keep any such hospitalization or treatment information confidential. It shall be at the discretion of the judge, considering the circumstances surrounding the hospitalization and the recommendation of the superintendent of the hospital or

treatment center where the individual was a patient, to issue the weapons carry license or renewal license;

(K) Except as provided for in subsection (b.1) of this Code section, any person who has been adjudicated mentally incompetent to stand trial; or

(L) Except as provided for in subsection (b.1) of this Code section, any person who has been adjudicated not guilty by reason of insanity at the time of the crime pursuant to Part 2 of Article 6 of Chapter 7 of Title 17.

(b.1) **Petitions for relief from certain licensing exceptions.**

(1) Persons provided for under subparagraphs (b)(2)(J), (b)(2)(K), and (b)(2)(L) of this Code section may petition the court in which such adjudication, hospitalization, or treatment proceedings, if any, under Chapter 3 or 7 of Title 37 occurred for relief. A copy of such petition for relief shall be served as notice upon the opposing civil party or the prosecuting attorney for the state, as the case may be, or their successors, who appeared in the underlying case. Within 30 days of the receipt of such petition, such court shall hold a hearing on such petition for relief. Such prosecuting attorney for the state may represent the interests of the state at such hearing.

(2) At the hearing provided for under paragraph (1) of this subsection, the court shall receive and consider evidence in a closed proceeding concerning:

(A) The circumstances which caused the person to be subject to subparagraph (b)(2)(J), (b)(2)(K), or (b)(2)(L) of this Code section;

(B) The person's mental health and criminal history records, if any. The judge of such court may require any such person to sign a waiver authorizing the superintendent of any mental hospital or treatment center to make to the judge a recommendation regarding whether such person is a threat to the safety of others. When such a waiver is required by the judge, the applicant shall pay a fee of $3.00 for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or the Department of Behavioral Health and Developmental Disabilities, which the judge shall remit to the hospital, center, or department;

(C) The person's reputation which shall be established through character witness statements, testimony, or other character evidence; and

(D) Changes in the person's condition or circumstances since such adjudication, hospitalization, or treatment proceedings under Chapter 3 or 7 of Title 37.

The judge shall issue an order of his or her decision no later than 30 days after the hearing.

(3) The court shall grant the petition for relief if such court finds by a preponderance of the evidence that the person will not likely act in a manner dangerous to public safety in carrying a weapon and that granting the relief will not be contrary to the public interest. A record shall be kept of the hearing; provided, however, that such records shall remain confidential and be disclosed only to a court or to the parties in the event of an appeal. Any appeal of the court's ruling on the petition for relief shall be de novo review.

(4) If the court grants such person's petition for relief, the applicable subparagraph (b)(2)(J), (b)(2)(K), or (b)(2)(L) of this Code section shall not apply to such person in his or her application for a weapons carry license or renewal; provided, however, that such person shall comply with all other requirements for the issuance of a weapons carry license or renewal license. The clerk of such court shall report such order to the Georgia Crime Information Center immediately, but in no case later than ten business days after the date of such order.

(5) A person may petition for relief under this subsection not more than once every two years. In the case of a person who has been hospitalized as an inpatient, such person shall not petition for relief prior to being discharged from such treatment.

(c) **Fingerprinting.** Following completion of the application for a weapons carry license, the judge of the probate court shall require the applicant to proceed to an appropriate law enforcement agency in the county or to any vendor approved by the Georgia Bureau of Investigation for fingerprint submission services with the completed application so that such agency or vendor can capture the fingerprints of the applicant. The law enforcement agency shall be entitled to a fee of $5.00 from the applicant for its services in connection with fingerprinting and processing of an application. Fingerprinting shall not be required for applicants seeking temporary renewal licenses or renewal licenses.

(d) **Investigation of applicant; issuance of weapons carry license; renewal.**

(1)(A) For weapons carry license applications, the judge of the probate court shall within five business days following the receipt of the application or request direct the law enforcement agency to request a fingerprint based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and return an appropriate report to the judge of the probate court. Fingerprints shall be in such form and of such quality as prescribed

by the Georgia Crime Information Center and under standards adopted by the Federal Bureau of Investigation. The Georgia Bureau of Investigation may charge such fee as is necessary to cover the cost of the records search.

(B) For requests for license renewals, the presentation of a weapons carry license issued by any probate judge in this state shall be evidence to the judge of the probate court to whom a request for license renewal is made that the fingerprints of the weapons carry license holder are on file with the judge of the probate court who issued the weapons carry license, and the judge of the probate court to whom a request for license renewal is made shall, within five business days following the receipt of the request, direct the law enforcement agency to request a nonfingerprint based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and return an appropriate report to the judge of the probate court to whom a request for license renewal is made.

(2) For both weapons carry license applications and requests for license renewals, the judge of the probate court shall within five business days following the receipt of the application or request also direct the law enforcement agency, in the same manner as provided for in subparagraph (d)(1)(B) of this subsection, to conduct a background check using the Federal Bureau of Investigation's National Instant Criminal Background Check System and return an appropriate report to the probate judge.

(3) When a person who is not a United States citizen applies for a weapons carry license or renewal of a license under this Code section, the judge of the probate court shall direct the law enforcement agency to conduct a search of the records maintained by United States Immigration and Customs Enforcement and return an appropriate report to the probate judge. As a condition to the issuance of a license or the renewal of a license, an applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y).

(4) The law enforcement agency shall report to the judge of the probate court within 30 days, by telephone and in writing, of any findings relating to the applicant which may bear on his or her eligibility for a weapons carry license or renewal license under the terms of this Code section. When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal license, a report shall not be required. The law enforcement agency shall return the application directly to the judge of the

probate court within such time period. Not later than ten days after the judge of the probate court receives the report from the law enforcement agency concerning the suitability of the applicant for a license, the judge of the probate court shall issue such applicant a license or renewal license to carry any weapon unless facts establishing ineligibility have been reported or unless the judge determines such applicant has not met all the qualifications, is not of good moral character, or has failed to comply with any of the requirements contained in this Code section. The judge of the probate court shall date stamp the report from the law enforcement agency to show the date on which the report was received by the judge of the probate court.

(e) **Revocation, loss, or damage to license.**

(1) If, at any time during the period for which the weapons carry license was issued, the judge of the probate court of the county in which the license was issued shall learn or have brought to his or her attention in any manner any reasonable ground to believe the licensee is not eligible to retain the license, the judge may, after notice and hearing, revoke the license of the person upon a finding that such person is not eligible for a weapons carry license pursuant to subsection (b) of this Code section or an adjudication of falsification of application, mental incompetency, or chronic alcohol or narcotic usage. The judge of the probate court shall report such revocation to the Georgia Crime Information Center immediately but in no case later than ten days after such revocation. It shall be unlawful for any person to possess a license which has been revoked pursuant to this paragraph, and any person found in possession of any such revoked license, except in the performance of his or her official duties, shall be guilty of a misdemeanor.

(2) If a person is convicted of any crime or involved in any matter which would make the maintenance of a weapons carry license by such person unlawful pursuant to subsection (b) of this Code section, the judge of the superior court or state court hearing such case or presiding over such matter shall inquire whether such person is the holder of a weapons carry license. If such person is the holder of a weapons carry license, then the judge of the superior court or state court shall inquire of such person the county of the probate court which issued such weapons carry license, or if such person has ever had his or her weapons carry license renewed, then of the county of the probate court which most recently issued such person a renewal license. The judge of the superior court or state court shall notify the judge of the probate court of such county of the matter which makes the maintenance of a weapons carry license by such person to be unlawful pursuant to subsection (b) of this Code section. The Council

of Superior Court Judges of Georgia and The Council of State Court Judges of Georgia shall provide by rule for the procedures which judges of the superior court and the judges of the state courts, respectively, are to follow for the purposes of this paragraph.

(3) Loss of any license issued in accordance with this Code section or damage to the license in any manner which shall render it illegible shall be reported to the judge of the probate court of the county in which it was issued within 48 hours of the time the loss or damage becomes known to the license holder. The judge of the probate court shall thereupon issue a replacement for and shall take custody of and destroy a damaged license; and in any case in which a license has been lost, he or she shall issue a cancellation order. The judge shall charge the fee specified in subsection (k) of Code Section 15-9-60 for such services.

(f)(1) **Weapons carry license specifications.** Weapons carry licenses issued prior to January 1, 2012, shall be in the format specified by the former provisions of this paragraph as they existed on June 30, 2013.

(2) On and after January 1, 2012, newly issued or renewal weapons carry licenses shall incorporate overt and covert security features which shall be blended with the personal data printed on the license to form a significant barrier to imitation, replication, and duplication. There shall be a minimum of three different ultraviolet colors used to enhance the security of the license incorporating variable data, color shifting characteristics, and front edge only perimeter visibility. The weapons carry license shall have a color photograph viewable under ambient light on both the front and back of the license. The license shall incorporate custom optical variable devices featuring the great seal of the State of Georgia as well as matching demetalized optical variable devices viewable under ambient light from the front and back of the license incorporating microtext and unique alphanumeric serialization specific to the license holder. The license shall be of similar material, size, and thickness of a credit card and have a holographic laminate to secure and protect the license for the duration of the license period.

(3) Using the physical characteristics of the license set forth in paragraph (2) of this subsection, The Council of Probate Court Judges of Georgia shall create specifications for the probate courts so that all weapons carry licenses in this state shall be uniform and so that probate courts can petition the Department of Administrative Services to purchase the equipment and supplies necessary for producing such licenses. The department shall follow the competitive bidding procedure set forth in Code Section 50-5-102.

(g) **Alteration or counterfeiting of license; penalty.** A person who deliberately alters or counterfeits a weapons carry license or who

possesses an altered or counterfeit weapons carry license with the intent to misrepresent any information contained in such license shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a period of not less than one nor more than five years.

(h) **Licenses for former law enforcement officers.** Except as otherwise provided in Code Section 16-11-130, any person who has served as a law enforcement officer for at least ten of the 12 years immediately preceding the retirement of such person as a law enforcement officer shall be entitled to be issued a weapons carry license as provided for in this Code section without the payment of any of the fees provided for in this Code section. Such person shall comply with all the other provisions of this Code section relative to the issuance of such licenses. As used in this subsection, the term "law enforcement officer" means any peace officer who is employed by the United States government or by the State of Georgia or any political subdivision thereof and who is required by the terms of his or her employment, whether by election or appointment, to give his or her full time to the preservation of public order or the protection of life and property or the prevention of crime. Such term shall include conservation rangers.

(i) **Temporary renewal licenses.**

(1) Any person who holds a weapons carry license under this Code section may, at the time he or she applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he or she then holds or if the previous license has expired within the last 30 days.

(2) Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge shall at the time of application issue a temporary renewal license to the applicant.

(3) Such a temporary renewal license shall be in the form of a paper receipt indicating the date on which the court received the renewal application and shall show the name, address, sex, age, and race of the applicant and that the temporary renewal license expires 90 days from the date of issue.

(4) During its period of validity the temporary renewal license, if carried on or about the holder's person together with the holder's previous license, shall be valid in the same manner and for the same purposes as a five-year license.

(5) A $1.00 fee shall be charged by the probate court for issuance of a temporary renewal license.

(6) A temporary renewal license may be revoked in the same manner as a five-year license.

(j) **Applicant may seek relief.** When an eligible applicant fails to receive a license, temporary renewal license, or renewal license within the time period required by this Code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary renewal license, or renewal license. When an applicant is otherwise denied a license, temporary renewal license, or renewal license and contends that he or she is qualified to be issued a license, temporary renewal license, or renewal license, the applicant may bring an action in mandamus or other legal proceeding in order to obtain such license. Additionally, the applicant may request a hearing before the judge of the probate court relative to the applicant's fitness to be issued such license. Upon the issuance of a denial, the judge of the probate court shall inform the applicant of his or her rights pursuant to this subsection. If such applicant is the prevailing party, he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees.

(k) **Data base prohibition.** A person or entity shall not create or maintain a multijurisdictional data base of information regarding persons issued weapons carry licenses.

(l) **Verification of license.** The judge of a probate court or his or her designee shall be authorized to verify the legitimacy and validity of a weapons carry license of a license holder pursuant to a subpoena or court order, for public safety purposes to law enforcement agencies pursuant to paragraph (40) of subsection (a) of Code Section 50-18-72, and for licensing to a judge of a probate court or his or her designee pursuant to paragraph (40) of subsection (a) of Code Section 50-18-72; provided, however, that the judge of a probate court or his or her designee shall not be authorized to provide any further information regarding license holders. (Ga. L. 1910, p. 134, §§ 2, 3; Code 1933, §§ 26-5104, 26-5105; Ga. L. 1960, p. 938, § 1; Code 1933, § 26-2904, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1976, p. 1430, § 4; Ga. L. 1978, p. 1607, §§ 1, 2; Ga. L. 1981, p. 946, § 1; Ga. L. 1981, p. 1325, § 1; Ga. L. 1983, p. 1431, § 1; Ga. L. 1984, p. 935, § 1; Ga. L. 1984, p. 1388, § 1; Ga. L. 1986, p. 305, § 1; Ga. L. 1986, p. 481, §§ 1, 2; Ga. L. 1990, p. 138, § 1; Ga. L. 1990, p. 2012, § 1; Ga. L. 1992, p. 6, § 16; Ga. L. 1994, p. 351, § 1; Ga. L. 1996, p. 108, §§ 3-5; Ga. L. 1997, p. 514, § 2; Ga. L. 2002, p. 1011, § 2; Ga. L. 2006, p. 264, § 1/HB 1032; Ga. L. 2008, p. 1199, § 6/HB 89; Ga. L. 2009, p. 453, § 3-2/HB 228; Ga. L. 2010, p. 963, § 1-7/SB 308; Ga. L. 2011, p. 752, § 16/HB 142; Ga. L. 2014, p. 599, § 1-7/HB 60; Ga. L. 2015, p. 805, § 6/HB 492.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

The 2015 amendment, effective July 1, 2015, rewrote this Code section.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry

Protection Act.'"

Ga. L. 2015, p. 805, § 6/HB 492, which amended this Code section, purported to amend subparagraph (b)(2)(A) but no changes were made, and also purported to amend paragraph (d)(1) but actually amended both paragraphs (d)(1) and (d)(2).

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 65 Mercer L. Rev. 295 (2013). For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Statute not unconstitutional. — O.C.G.A. § 16-11-129, which regulated the ability of citizens to carry a weapon in public, was justified by the goal to protect the safety of individuals who are in public places, which was a legitimate and compelling government interest. The statute was not unconstitutional as applied to an applicant who pled nolo contendre to violent felonies in Florida more than 20 years earlier, under either U.S. Const,. amend. II or Ga. Const. 1983, Art. I, Sec. I, Para. VIII. Hertz v. Bennett, 294 Ga. 62, 751 S.E.2d 90 (2013).

Right to weapons carry license restored. — When the Georgia Board of Pardons and Paroles restored "all" of the applicant's civil rights and removed "all" disabilities imposed on the applicant by Georgia law, it was apparent that the applicant regained any right to keep and bear arms that the applicant had lost as a result of a felony moonshining conviction, and the applicant was not subject to the disabilities to obtain a weapons carry license and possess firearms that otherwise would have applied to the applicant under O.C.G.A. §§ 16-11-129 and 16-11-131(b). Ferguson v. Perry, 292 Ga. 666, 740 S.E.2d 598 (2013).

16-11-130. Exemptions from Code Sections 16-11-126 through 16-11-127.2.

(a) Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect any of the following persons if such persons are employed in the offices listed below or when authorized by federal or state law, regulations, or order:

(1) Peace officers, as such term is defined in paragraph (11) of Code Section 16-1-3, and retired peace officers so long as they remain certified whether employed by the state or a political subdivision of the state or another state or a political subdivision of another state but only if such other state provides a similar privilege for the peace officers of this state;

(2) Wardens, superintendents, and keepers of correctional institutions, jails, or other institutions for the detention of persons accused or convicted of an offense;

(3) Persons in the military service of the state or of the United States;

(4) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of

the weapon or long gun is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(5) District attorneys, investigators employed by and assigned to a district attorney's office, assistant district attorneys, attorneys or investigators employed by the Prosecuting Attorneys' Council of the State of Georgia, and any retired district attorney, assistant district attorney, district attorney's investigator, or attorney or investigator retired from the Prosecuting Attorneys' Council of the State of Georgia, if such employee is retired in good standing and is receiving benefits under Title 47 or is retired in good standing and receiving benefits from a county or municipal retirement system;

(6) State court solicitors-general; investigators employed by and assigned to a state court solicitor-general's office; assistant state court solicitors-general; the corresponding personnel of any city court expressly continued in existence as a city court pursuant to Article VI, Section X, Paragraph I, subparagraph (5) of the Constitution; and the corresponding personnel of any civil court expressly continued as a civil court pursuant to said provision of the Constitution;

(7) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon or long gun;

(8) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon or long gun;

(9) Community supervision officers employed by and under the authority of the Department of Community Supervision when specifically designated and authorized in writing by the commissioner of community supervision;

(10) Public safety directors of municipal corporations;

(11) Explosive ordnance disposal technicians, as such term is defined by Code Section 16-7-80, and persons certified as provided in Code Section 35-8-13 to handle animals trained to detect explosives, while in the performance of their duties;

(12) State and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal and city courts;

(12.1) Former state and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal courts who are retired from their respective offices, provided that such judge would otherwise be qualified to be issued a weapons carry license;

(12.2) Former state and federal judges, judges of probate, juvenile, and magistrate courts, full-time judges of municipal and city courts, and permanent part-time judges of municipal courts who are no longer serving in their respective office, provided that he or she served as such judge for more than 24 months and provided, further, that such judge would otherwise be qualified to be issued a weapons carry license;

(13) United States Attorneys and Assistant United States Attorneys;

(14) County medical examiners and coroners and their sworn officers employed by county government;

(15) Clerks of the superior courts; and

(16) Constables employed by a magistrate court of this state.

(b) Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect persons who at the time of their retirement from service with the Department of Community Supervision were community supervision officers, when specifically designated and authorized in writing by the commissioner of community supervision.

(c) Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect any:

(1) Sheriff, retired sheriff, deputy sheriff, or retired deputy sheriff if such retired sheriff or deputy sheriff is eligible to receive or is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47, the Sheriffs' Retirement Fund of Georgia provided under Chapter 16 of Title 47, or any other public retirement system established under the laws of this state for service as a law enforcement officer;

(2) Member of the Georgia State Patrol or agent of the Georgia Bureau of Investigation or retired member of the Georgia State Patrol or agent of the Georgia Bureau of Investigation if such retired member or agent is receiving benefits under the Employees' Retirement System;

(3) Full-time law enforcement chief executive engaging in the management of a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive that is registered or certified by the Georgia Peace Officer Standards and Training Council; or retired law enforcement chief executive that formerly managed a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive that was registered or certified at the

time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such retired law enforcement chief executive is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system; or

(4) Police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer that is registered or certified by the Georgia Peace Officer Standards and Training Council, or retired police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer that was registered or certified at the time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such retired employee is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system.

In addition, any such sheriff, retired sheriff, deputy sheriff, retired deputy sheriff, active or retired law enforcement chief executive, or other law enforcement officer referred to in this subsection shall be authorized to carry a handgun on or off duty anywhere within the state and the provisions of Code Sections 16-11-126 through 16-11-127.2 shall not apply to the carrying of such firearms.

(d) A prosecution based upon a violation of Code Section 16-11-126 or 16-11-127 need not negative any exemptions. (Code 1933, § 26-2907, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1974, p. 481, § 1; Ga. L. 1979, p. 1019, § 1; Ga. L. 1982, p. 3, § 16; Ga. L. 1982, p. 789, § 2; Ga. L. 1984, p. 22, § 16; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 1205, § 2; Ga. L. 1988, p. 472, § 1; Ga. L. 1990, p. 558, § 1; Ga. L. 1991, p. 94, § 16; Ga. L. 1993, p. 604, § 1; Ga. L. 1994, p. 547, § 2; Ga. L. 1996, p. 416, § 6; Ga. L. 1996, p. 748, § 12; Ga. L. 1997, p. 514, § 3; Ga. L. 1998, p. 657, §§ 1-3; Ga. L. 2000, p. 843, §§ 1, 2; Ga. L. 2003, p. 140, § 16; Ga. L. 2006, p. 531, § 1/HB 1044; Ga. L. 2008, p. 577, § 16/SB 396; Ga. L. 2010, p. 963, § 2-7/SB 308; Ga. L. 2011, p. 508, § 1/HB 266; Ga. L. 2014, p. 599, § 1-8/HB 60; Ga. L. 2015, p. 422, § 5-28/HB 310.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of paragraph (a)(12) for the former provisions, which read: "State and federal trial and appellate judges, full-time and permanent part-time judges of municipal and city courts, and former state trial and appellate judges retired from their respective offices under state retirement;"; and added paragraphs (a)(12.1) and (a)(12.2).

The 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (a)(9) for the former provisions, which read: "Chief probation officers, probation officers, intensive probation officers, and surveillance officers

employed by and under the authority of the Department of Corrections pursuant to Article 2 of Chapter 8 of Title 42, known as the 'State-wide Probation Act,' when specifically designated and authorized in writing by the director of Division of Probation;"; and substituted the present provisions of subsection (b) for the former provisions, which read: "Code Sections 16-11-126 through 16-11-127.2 shall not apply to or affect persons who at the time of their retirement from service with the Department of Corrections were chief probation officers, probation officers, intensive probation officers, or surveillance officers, when specifically designated and authorized in writing by the director of the Division of Probation." See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that this Act shall apply to sentences entered on or after July 1, 2015.

16-11-130.1. Allowing personnel to carry weapons within certain school safety zones and at school functions.

(a) As used in this Code section, the term:

(1) "Bus or other transportation furnished by a school" means a bus or other transportation furnished by a public or private elementary or secondary school.

(2) "School function" means a school function or related activity that occurs outside of a school safety zone for a public or private elementary or secondary school.

(3) "School safety zone" means in or on any real property or building owned by or leased to any public or private elementary or secondary school or local board of education and used for elementary or secondary education.

(4) "Weapon" shall have the same meaning as set forth in Code Section 16-11-127.1.

(b) This Code section shall not be construed to require or otherwise mandate that any local board of education or school administrator adopt or implement a practice or program for the approval of personnel to possess or carry weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school nor shall this Code section create any liability for adopting or declining to adopt such practice or program. Such decision shall rest with each individual local board of education. If a local board of education adopts a policy to allow certain personnel to possess or carry weapons as provided in paragraph (6) of subsection (c) of Code Section 16-11-127.1, such policy shall include approval of personnel to possess or carry weapons and provide for:

(1) Training of approved personnel prior to authorizing such personnel to carry weapons. The training shall at a minimum include

training on judgment pistol shooting, marksmanship, and a review of current laws relating to the use of force for the defense of self and others; provided, however, that the local board of education training policy may substitute for certain training requirements the personnel's prior military or law enforcement service if the approved personnel has previously served as a certified law enforcement officer or has had military service which involved similar weapons training;

(2) An approved list of the types of weapons and ammunition and the quantity of weapons and ammunition authorized to be possessed or carried;

(3) The exclusion from approval of any personnel who has had an employment or other history indicating any type of mental or emotional instability as determined by the local board of education; and

(4) A mandatory method of securing weapons which shall include at a minimum a requirement that the weapon, if permitted to be carried concealed by personnel, shall be carried on the person and not in a purse, briefcase, bag, or similar other accessory which is not secured on the body of the person and, if maintained separate from the person, shall be maintained in a secured lock safe or similar lock box that cannot be easily accessed by students.

(c) Any personnel selected to possess or carry weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school shall be a license holder, and the local board of education shall be responsible for conducting a criminal history background check of such personnel annually to determine whether such personnel remains qualified to be a license holder.

(d) The selection of approved personnel to possess or carry a weapon within a school safety zone, at a school function, or on a bus or other transportation furnished by a school shall be done strictly on a voluntary basis. No personnel shall be required to possess or carry a weapon within a school safety zone, at a school function, or on a bus or other transportation furnished by a school and shall not be terminated or otherwise retaliated against for refusing to possess or carry a weapon.

(e) The local board of education shall be responsible for any costs associated with approving personnel to carry or possess weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school; provided, however, that nothing contained in this Code section shall prohibit any approved personnel from paying for part or all of such costs or using any other funding mechanism available, including donations or grants from private persons or entities.

(f) Documents and meetings pertaining to personnel approved to carry or possess weapons within a school safety zone, at a school function, or on a bus or other transportation furnished by a school shall be considered employment and public safety security records and shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. (Code 1981, § 16-11-130.1, enacted by Ga. L. 2014, p. 599, § 1-9/HB 60.)

Effective date. — This Code section became effective July 1, 2014.

Cross references. — School safety plans, § 20-2-1185.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

16-11-130.2. Carrying a weapon or long gun at a commercial service airport.

(a) No person shall enter the restricted access area of a commercial service airport, in or beyond the airport security screening checkpoint, knowingly possessing or knowingly having under his or her control a weapon or long gun. Such area shall not include an airport drive, general parking area, walkway, or shops and areas of the terminal that are outside the screening checkpoint and that are normally open to unscreened passengers or visitors to the airport. Any restricted access area shall be clearly indicated by prominent signs indicating that weapons are prohibited in such area.

(b) A person who is not a license holder and who violates this Code section shall be guilty of a misdemeanor. A license holder who violates this Code section shall be guilty of a misdemeanor; provided, however, that a license holder who is notified at the screening checkpoint for the restricted access area that he or she is in possession of a weapon or long gun and who immediately leaves the restricted access area following such notification and completion of federally required transportation security screening procedures shall not be guilty of violating this Code section.

(c) Any person who violates this Code section with the intent to commit a separate felony offense shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $1,000.00 nor more than $15,000.00, imprisonment for not less than one nor more than ten years, or both.

(d) Any ordinance, resolution, regulation, or policy of any county, municipality, or other political subdivision of this state which is in conflict with this Code section shall be null, void, and of no force and effect, and this Code section shall preempt any such ordinance, resolu-

tion, regulation, or policy. (Code 1981, § 16-11-130.2, enacted by Ga. L. 2014, p. 599, § 1-9/HB 60.)

Effective date. — This Code section became effective July 1, 2014.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Updating of crimes and offenses for which Georgia Crime Information Center is authorized to collect and file fingerprints. — Pursuant to authority granted to the Attorney General in O.C.G.A. § 35-3-33(a)(1)(A)(v), any misdemeanor offenses arising under O.C.G.A. §§ 16-11-130.2, 16-11-90(b), 16-8-14.1(a), 16-8-22, and 33-24-53, are designated as ones for which those charged are to be fingerprinted. 2014 Op. Att'y Gen. No. 2014-2.

16-11-131. Possession of firearms by convicted felons and first offender probationers.

(a) As used in this Code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm" includes any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who is on probation as a felony first offender pursuant to Article 3 of Chapter 8 of Title 42 or who has been convicted of a felony by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation and who receives, possesses, or transports any firearm commits a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years; provided, however, that if the felony as to which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person shall be imprisoned for a period of five years.

(b.1) Any person who is prohibited by this Code section from possessing a firearm because of conviction of a forcible felony or because of being on probation as a first offender for a forcible felony pursuant to this Code section and who attempts to purchase or obtain transfer of a firearm shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(c) This Code section shall not apply to any person who has been pardoned for the felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitutions or laws of the several states or of a foreign nation and, by the terms of the pardon, has expressly been authorized to receive, possess, or transport a firearm.

(d) A person who has been convicted of a felony, but who has been granted relief from the disabilities imposed by the laws of the United States with respect to the acquisition, receipt, transfer, shipment, or possession of firearms by the secretary of the United States Department of the Treasury pursuant to 18 U.S.C. Section 925, shall, upon presenting to the Board of Public Safety proof that the relief has been granted and it being established from proof submitted by the applicant to the satisfaction of the Board of Public Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A person who has been convicted under federal or state law of a felony pertaining to antitrust violations, unfair trade practices, or restraint of trade shall, upon presenting to the Board of Public Safety proof, and it being established from said proof, submitted by the applicant to the satisfaction of the Board of Public Safety that the circumstances regarding the conviction and the applicant's record and reputation are such that the acquisition, receipt, transfer, shipment, or possession of firearms by the person would not present a threat to the safety of the citizens of Georgia and that the granting of the relief sought would not be contrary to the public interest, be granted relief from the disabilities imposed by this Code section. A record that the relief has been granted by the board shall be entered upon the criminal history of the person maintained by the Georgia Crime Information Center and the board shall maintain a list of the names of such persons which shall be open for public inspection.

(e) As used in this Code section, the term "forcible felony" means any felony which involves the use or threat of physical force or violence against any person and further includes, without limitation, murder; murder in the second degree; burglary in any degree; robbery; armed robbery; home invasion in any degree; kidnapping; hijacking of an aircraft or motor vehicle; aggravated stalking; rape; aggravated child molestation; aggravated sexual battery; arson in the first degree; the manufacturing, transporting, distribution, or possession of explosives with intent to kill, injure, or intimidate individuals or destroy a public building; terroristic threats; or acts of treason or insurrection.

(f) Any person placed on probation as a first offender pursuant to Article 3 of Chapter 8 of Title 42 and subsequently discharged without

court adjudication of guilt pursuant to Code Section 42-8-62 shall, upon such discharge, be relieved from the disabilities imposed by this Code section. (Code 1933, § 26-2914, enacted by Ga. L. 1980, p. 1509, § 1; Ga. L. 1982, p. 1171, § 2; Ga. L. 1983, p. 945, § 1; Ga. L. 1987, p. 476, §§ 1, 2; Ga. L. 1989, p. 14, § 16; Ga. L. 2000, p. 1630, § 5; Ga. L. 2012, p. 899, § 8-5/HB 1176; Ga. L. 2014, p. 426, § 4/HB 770; Ga. L. 2014, p. 444, § 2-5/HB 271.)

The 2012 amendment, effective July 1, 2012, inserted "in any degree" near the middle of subsection (e). See editor's note for applicability.

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, inserted "home invasion in any degree;" in the middle of subsection (e). The second 2014 amendment, effective July 1, 2014, substituted "murder in the second degree" for "felony murder" near the middle of subsection (e).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DOUBLE JEOPARDY

General Consideration

Probable cause for arrest.

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with them; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. Culpepper v. State, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Constructive possession is sufficient to prove a violation.

Defendant's conviction of possession of a firearm by a convicted felon was proper because the act of any one of the conspirators involved was the act of all, and because the defendant's co-conspirator possessed a weapon, it followed that the defendant was in constructive possession of the weapon. Murray v. State, 309 Ga. App. 828, 711 S.E.2d 387 (2011).

Possession of firearms by convicted felons.

Evidence was sufficient to show that the defendant constructively possessed three firearms as a convicted felon in violation of O.C.G.A. § 16-11-131(b) because the defendant's bedroom contained two firearms and ammunition for a third gun that was found in a spare bedroom, and a shed the defendant used also contained ammunition for the guns. Layne v. State, 313 Ga. App. 608, 722 S.E.2d 351 (2012).

Possession of black powder guns sufficient. — Evidence that the defen-

dant was found in possession of two black powder guns was sufficient to support the convictions for possession of a firearm during the commission of a crime and by a convicted felon. Hall v. State, 322 Ga. App. 313, 744 S.E.2d 833 (2013).

Bifurcation.

Trial court did not err in denying the defendant's motion to bifurcate and separately try the count for being a felon in possession of a firearm because bifurcation was not authorized when the charge of being a felon in possession served as the underlying felony for felony murder. Poole v. State, 291 Ga. 848, 734 S.E.2d 1 (2012).

Evidence sufficient to sustain conviction.

Jury was authorized to find the defendant guilty of voluntary manslaughter, O.C.G.A. § 16-5-2(a), aggravated assault, O.C.G.A. § 16-5-21(a)(2), possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), carrying a concealed weapon, O.C.G.A. § 16-11-126(b), and possession of a firearm by a convicted felon, O.C.G.A. § 16-11-131(b), because during an argument with the victims, the defendant shot the victims and threatened to kill the victims. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Evidence that the defendant, who threatened to kill the victim in the past, took the victim to a retention pond, shot the victim, wrapped the body with a large boulder, placed the victim in a retention pond, and, for days, misled the victim's mother and authorities about the victim's whereabouts was sufficient to support convictions for malice murder, felony murder, feticide, aggravated assault, and possession of a firearm. Platt v. State, 291 Ga. 631, 732 S.E.2d 75 (2012).

Evidence was sufficient to convict the defendant of burglary, aggravated assault, possession of a firearm during the commission of the aggravated assault, and possession of a firearm by a convicted felon because a house-sitter returned to a residence to discover an intruder inside; the intruder flashed a gun and told the house-sitter that the intruder would shoot the house-sitter; the house-sitter identified the defendant, whom the house-sitter had known for over 20 years, as the intruder; and a back window of the home had been shattered. Davis v. State, 325 Ga. App. 572, 754 S.E.2d 151 (2014).

No evidence of constructive possession. — Conviction was reversed in part because while the defendant knew the location of the shotgun, there was no evidence presented that the defendant had actual possession of the shotgun outside of possibly handing the shotgun to officers at the officers' request, nor was there evidence that the defendant was in constructive possession of the shotgun in violation of O.C.G.A. § 16-11-131(b). Peppers v. State, 315 Ga. App. 770, 728 S.E.2d 286 (2012).

Cited in Hyman v. State, 320 Ga. App. 106, 739 S.E.2d 395 (2013); Ferguson v. Perry, 292 Ga. 666, 740 S.E.2d 598 (2013); Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013); Banks v. State, 329 Ga. App. 174, 764 S.E.2d 187 (2014).

Double Jeopardy

Failure to merge offense. — Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

16-11-132. Possession of handgun by person under the age of 18 years.

(a) For the purposes of this Code section, a handgun is considered loaded if there is a cartridge in the chamber or cylinder of the handgun.

(b) Notwithstanding any other provisions of this part and except as otherwise provided in this Code section, it shall be unlawful for any

person under the age of 18 years to possess or have under such person's control a handgun. A person convicted of a first violation of this subsection shall be guilty of a misdemeanor and shall be punished by a fine not to exceed $1,000.00 or by imprisonment for not more than 12 months, or both. A person convicted of a second or subsequent violation of this subsection shall be guilty of a felony and shall be punished by a fine of $5,000.00 or by imprisonment for a period of three years, or both.

(c) Except as otherwise provided in subsection (d) of this Code section, the provisions of subsection (b) of this Code section shall not apply to:

(1) Any person under the age of 18 years who is:

(A) Attending a hunter education course or a firearms safety course;

(B) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction where such range is located;

(C) Engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by an organized group under 26 U.S.C. Section 501(c)(3) which uses firearms as a part of such performance;

(D) Hunting or fishing pursuant to a valid license if such person has in his or her possession such a valid hunting or fishing license if required; is engaged in legal hunting or fishing; has permission of the owner of the land on which the activities are being conducted; and the handgun, whenever loaded, is carried only in an open and fully exposed manner; or

(E) Traveling to or from any activity described in subparagraphs (A) through (D) of this paragraph if the handgun in such person's possession is not loaded;

(2) Any person under the age of 18 years who is on real property under the control of such person's parent, legal guardian, or grandparent and who has the permission of such person's parent or legal guardian to possess a handgun; or

(3) Any person under the age of 18 years who is at such person's residence and who, with the permission of such person's parent or legal guardian, possesses a handgun for the purpose of exercising the rights authorized in Code Section 16-3-21 or 16-3-23.

(d) Subsection (c) of this Code section shall not apply to any person under the age of 18 years who has been convicted of a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, or who has been adjudicated for committing a delinquent act under the provisions

of Article 6 of Chapter 11 of Title 15 for an offense which would constitute a forcible felony or forcible misdemeanor, as defined in Code Section 16-1-3, if such person were an adult. (Code 1981, § 16-11-132, enacted by Ga. L. 1994, p. 1012, § 12; Ga. L. 2000, p. 1630, § 6; Ga. L. 2010, p. 963, § 1-8/SB 308; Ga. L. 2013, p. 294, § 4-11/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted "adjudicated for committing a delinquent act" for "adjudicated delinquent" and substituted "Article 6" for "Article 1" in subsection (d). See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

JUDICIAL DECISIONS

Evidence sufficient for adjudication.

Evidence was sufficient to support a finding of guilt on six counts of aggravated assault and one count of possession of a handgun by an underage person because the evidence included direct evidence in the form of eyewitness testimony identifying the juvenile as shooting and discarding the gun. In the Interest of T. D. J., 325 Ga. App. 786, 755 S.E.2d 29 (2014).

Evidence sufficient for conviction. — Because the defendant pointed a gun at the victim while defendant's accomplices robbed the victim, and thereafter shot at the victim's trailer, hitting a child and killing the victim's sister-in-law, the evidence was sufficient to find defendant guilty of felony murder, aggravated assault, armed robbery, cruelty to children, possession of a gun during the commission of a crime, and possession of a revolver by a person under the age of 18. Lytle v. State, 290 Ga. 177, 718 S.E.2d 296 (2011).

Sentencing error. — Defendant's sentence for violating O.C.G.A. § 16-11-132(b) was vacated and the case was remanded for resentencing because the trial court improperly sentenced the defendant to a felony-level sentence of five years on the conviction for misdemeanor possession of a pistol by a person under the age of 18. Oliphant v. State, 295 Ga. 597, 759 S.E.2d 821 (2014).

16-11-133. Minimum periods of confinement for persons convicted who have prior convictions.

(a) As used in this Code section, the term:

(1) "Felony" means any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States.

(2) "Firearm" includes any handgun, rifle, shotgun, stun gun, taser, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge.

(b) Any person who has previously been convicted of or who has previously entered a guilty plea to the offense of murder, murder in the second degree, armed robbery, home invasion in any degree, kidnapping, rape, aggravated child molestation, aggravated sodomy, aggravated sexual battery, or any felony involving the use or possession of a firearm and who shall have on or within arm's reach of his or her person a firearm during the commission of, or the attempt to commit:

(1) Any crime against or involving the person of another;

(2) The unlawful entry into a building or vehicle;

(3) A theft from a building or theft of a vehicle;

(4) Any crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance as provided in Code Section 16-13-30; or

(5) Any crime involving the trafficking of cocaine, marijuana, or illegal drugs as provided in Code Section 16-13-31,

and which crime is a felony, commits a felony and, upon conviction thereof, shall be punished by confinement for a period of 15 years, such sentence to run consecutively to any other sentence which the person has received.

(c) Upon the second or subsequent conviction of a convicted felon under this Code section, such convicted felon shall be punished by confinement for life. Notwithstanding any other law to the contrary, the sentence of any convicted felon which is imposed for violating this Code section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.

(d) Any crime committed in violation of subsections (b) and (c) of this Code section shall be considered a separate offense. (Code 1981, § 16-11-133, enacted by Ga. L. 1995, p. 137, § 1; Ga. L. 2014, p. 426, § 5/HB 770; Ga. L. 2014, p. 444, § 2-6/HB 271.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, inserted "home invasion in any degree," near the middle of the introductory paragraph of subsection (b). The second 2014 amendment, effective July 1, 2014, inserted "murder in the second degree," near the middle of the introductory paragraph of subsection (b).

JUDICIAL DECISIONS

Insufficient evidence of defendant as convicted felon.

Defendant's sentence, as a recidivist, of concurrent 20 year terms on each of three counts of aggravated assault, concurrently five years terms on each of three counts of possession of a firearm during the commission of a crime, to run consecutively to the aggravated assault sentence, and concurrent 15 year terms on each of two counts of possession of a firearm by a convicted felon, to run consecutive to the aggravated assault sentence, was not cruel, inhumane, and unusual punishment because each sentence was within the statutory limits of the crimes charge, and the sentence was not grossly disproportionate to the underlying crimes. Willis v. State, 316 Ga. App. 258, 728 S.E.2d 857 (2012).

Failure to merge. — Trial court erred in failing to merge, for purposes of sentencing, the defendant's convictions for possession of a firearm during the commission of a crime and possession of a firearm by a convicted felon with use of a firearm by a convicted felon during the commission of another felony, because the same act was used to establish each of the offenses and each crime did not require proof of a fact not required by the other. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012).

16-11-135. Public or private employer's parking lots; right of privacy in vehicles in employer's parking lot or invited guests on lot; severability; rights of action.

(a) Except as provided in this Code section, no private or public employer, including the state and its political subdivisions, shall establish, maintain, or enforce any policy or rule that has the effect of allowing such employer or its agents to search the locked privately owned vehicles of employees or invited guests on the employer's parking lot and access thereto.

(b) Except as provided in this Code section, no private or public employer, including the state and its political subdivisions, shall condition employment upon any agreement by a prospective employee that prohibits an employee from entering the parking lot and access thereto when the employee's privately owned motor vehicle contains a firearm or ammunition, or both, that is locked out of sight within the trunk, glove box, or other enclosed compartment or area within such privately owned motor vehicle, provided that any applicable employees possess a Georgia weapons carry license.

(c) Subsection (a) of this Code section shall not apply:

(1) To searches by certified law enforcement officers pursuant to valid search warrants or valid warrantless searches based upon probable cause under exigent circumstances;

(2) To vehicles owned or leased by an employer;

(3) To any situation in which a reasonable person would believe that accessing a locked vehicle of an employee is necessary to prevent an immediate threat to human health, life, or safety; or

(4) When an employee consents to a search of his or her locked privately owned vehicle by licensed private security officers for loss prevention purposes based on probable cause that the employee unlawfully possesses employer property.

(d) Subsections (a) and (b) of this Code section shall not apply:

(1) To an employer providing applicable employees with a secure parking area which restricts general public access through the use of a gate, security station, security officers, or other similar means which limit public access into the parking area, provided that any employer policy allowing vehicle searches upon entry shall be applicable to all vehicles entering the property and applied on a uniform and frequent basis;

(2) To any penal institution, correctional institution, detention facility, diversion center, jail, or similar place of confinement or confinement alternative;

(3) To facilities associated with electric generation owned or operated by a public utility;

(4) To any United States Department of Defense contractor, if such contractor operates any facility on or contiguous with a United States military base or installation or within one mile of an airport;

(5) To an employee who is restricted from carrying or possessing a firearm on the employer's premises due to a completed or pending disciplinary action;

(6) Where transport of a firearm on the premises of the employer is prohibited by state or federal law or regulation;

(7) To parking lots contiguous to facilities providing natural gas transmission, liquid petroleum transmission, water storage and supply, and law enforcement services determined to be so vital to the State of Georgia, by a written determination of the Georgia Department of Homeland Security, that the incapacity or destruction of such systems and assets would have a debilitating impact on public health or safety; or

(8) To any area used for parking on a temporary basis.

(e) No employer, property owner, or property owner's agent shall be held liable in any criminal or civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession, or use of a firearm, including, but not limited to, the theft of a firearm from an employee's automobile, pursuant to this Code section unless such employer commits a criminal act involving the use of a firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer's premises. Nothing

contained in this Code section shall create a new duty on the part of the employer, property owner, or property owner's agent. An employee at will shall have no greater interest in employment created by this Code section and shall remain an employee at will.

(f) In any action relating to the enforcement of any right or obligation under this Code section, an employer, property owner, or property owner's agent's efforts to comply with other applicable federal, state, or local safety laws, regulations, guidelines, or ordinances shall be a complete defense to any employer, property owner, or property owner's agent's liability.

(g) In any action brought against an employer, employer's agent, property owner, or property owner's agent relating to the criminal use of firearms in the workplace, the plaintiff shall be liable for all legal costs of such employer, employer's agent, property owner, or property owner's agent if such action is concluded in such employer, employer's agent, property owner, or property owner's agent's favor.

(h) This Code section shall not be construed so as to require an employer, property owner, or property owner's agent to implement any additional security measures for the protection of employees, customers, or other persons. Implementation of remedial security measures to provide protection to employees, customers, or other persons shall not be admissible in evidence to show prior negligence or breach of duty of an employer, property owner, or property owner's agent in any action against such employer, its officers or shareholders, or property owners.

(i) All actions brought based upon a violation of subsection (a) of this Code section shall be brought exclusively by the Attorney General.

(j) In the event that subsection (e) of this Code section is declared or adjudged by any court to be invalid or unconstitutional for any reason, the remaining portions of this Code section shall be invalid and of no further force or effect. The General Assembly declares that it would not have enacted the remaining provisions of this Code section if it had known that such portion hereof would be declared or adjudged invalid or unconstitutional.

(k) Nothing in this Code section shall restrict the rights of private property owners or persons in legal control of property through a lease, a rental agreement, a contract, or any other agreement to control access to such property. When a private property owner or person in legal control of property through a lease, a rental agreement, a contract, or any other agreement is also an employer, his or her rights as a private property owner or person in legal control of property shall govern. (Code 1981, § 16-11-135, enacted by Ga. L. 2008, p. 1199, § 7/HB 89; Ga. L. 2009, p. 8, § 16/SB 46; Ga. L. 2010, p. 963, § 1-9/SB 308; Ga. L. 2015, p. 805, § 7/HB 492.)

The 2015 amendment, effective July 1, 2015, inserted "or ammunition, or both," near the middle of subsection (b).

Law reviews. — For article, "Crimes and Offenses," see 27 Ga. St. U.L. Rev. 131 (2011).

16-11-136. Restrictions on possession, manufacture, sale, or transfer of knives.

(a) As used in this Code section, the term:

(1) "Courthouse" shall have the same meaning as set forth in Code Section 16-11-127.

(2) "Government building" shall have the same meaning as set forth in Code Section 16-11-127.

(3) "Knife" means any cutting instrument with a blade and shall include, without limitation, a knife as such term is defined in Code Section 16-11-125.1.

(b) Except for restrictions in courthouses and government buildings, no county, municipality, or consolidated government shall, by rule or ordinance, constrain the possession, manufacture, sale, or transfer of a knife more restrictively than the provisions of this part. (Code 1981, § 16-11-136, enacted by Ga. L. 2012, p. 1141, § 1/SB 432.)

Effective date. — This Code section became effective July 1, 2012.

16-11-137. Required possession of weapons carry license or proof of exemption when carrying a weapon; detention for investigation of carrying permit.

(a) Every license holder shall have his or her valid weapons carry license in his or her immediate possession at all times when carrying a weapon, or if such person is exempt from having a weapons carry license pursuant to Code Section 16-11-130 or subsection (c) of Code Section 16-11-127.1, he or she shall have proof of his or her exemption in his or her immediate possession at all times when carrying a weapon, and his or her failure to do so shall be prima-facie evidence of a violation of the applicable provision of Code Sections 16-11-126 through 16-11-127.2.

(b) A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license.

(c) A person convicted of a violation of this Code section shall be fined not more than $10.00 if he or she produces in court his or her weapons carry license, provided that it was valid at the time of his or her arrest, or produces proof of his or her exemption. (Code 1981, § 16-11-137,

enacted by Ga. L. 2014, p. 432, § 1-2/HB 826; Code 1981, § 16-11-137, enacted by Ga. L. 2014, p. 599, § 1-10/HB 60.)

Effective date. — This Code section became effective July 1, 2014.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2014, the enactment of this Code section by Ga. L. 2014, p. 432, § 1-2/HB 826, was treated as impliedly repealed and superseded by Ga. L. 2014, p. 599, § 1-10/HB 60, due to irreconcilable conflict.

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

16-11-138. Defense of self or others as absolute defense.

Defense of self or others, as contemplated by and provided for under Article 2 of Chapter 3 of this title, shall be an absolute defense to any violation under this part. (Code 1981, § 16-11-138, enacted by Ga. L. 2014, p. 599, § 1-10/HB 60; Ga. L. 2015, p. 5, § 16/HB 90.)

Effective date. — This Code section became effective July 1, 2014.

The 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, substituted "this title" for "Title 16".

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

Part 4A

Enhanced Criminal Penalties

16-11-160. Use of machine guns, sawed-off rifles, sawed-off shotguns, or firearms with silencers during commission of certain offenses; enhanced criminal penalties.

(a)(1) It shall be unlawful for any person to possess or to use a machine gun, sawed-off rifle, sawed-off shotgun, or firearm equipped with a silencer, as those terms are defined in Code Section 16-11-121, during the commission or the attempted commission of any of the following offenses:

(A) Aggravated assault as defined in Code Section 16-5-21;

(B) Aggravated battery as defined in Code Section 16-5-24;

(C) Robbery as defined in Code Section 16-8-40;

(D) Armed robbery as defined in Code Section 16-8-41;

(D.1) Home invasion in any degree as defined in Code Section 16-7-5;

(E) Murder or felony murder as defined in Code Section 16-5-1;

(F) Voluntary manslaughter as defined in Code Section 16-5-2;

(G) Involuntary manslaughter as defined in Code Section 16-5-3;

(H) Sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances in violation of any provision of Article 2 of Chapter 13 of this title, the "Georgia Controlled Substances Act";

(I) Terroristic threats or acts as defined in Code Section 16-11-37;

(J) Arson as defined in Code Section 16-7-60, 16-7-61, or 16-7-62 or arson of lands as defined in Code Section 16-7-63;

(K) Influencing witnesses as defined in Code Section 16-10-93; and

(L) Participation in criminal gang activity as defined in Code Section 16-15-4.

(2)(A) As used in this paragraph, the term "bulletproof vest" means a bullet-resistant soft body armor providing, as a minimum standard, the level of protection known as "threat level I," which means at least seven layers of bullet-resistant material providing protection from at least three shots of 158-grain lead ammunition fired from a .38 caliber handgun at a velocity of 850 feet per second.

(B) It shall be unlawful for any person to wear a bulletproof vest during the commission or the attempted commission of any of the following offenses:

(i) Any crime against or involving the person of another in violation of any of the provisions of this title for which a sentence of life imprisonment may be imposed;

(ii) Any felony involving the manufacture, delivery, distribution, administering, or selling of controlled substances or marijuana as provided in Code Section 16-13-30; or

(iii) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine as provided in Code Section 16-13-31.

(b) Any person who violates paragraph (1) of subsection (a) of this Code section shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement for a period of ten years, such sentence to run consecutively to any other sentence which the person has received. Any person who violates paragraph (2) of subsection (a) of this Code section shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement for a period of one to five

years, such sentence to run consecutively to any other sentence which the person has received.

(c) Upon the second or subsequent conviction of a person under this Code section, the person shall be punished by life imprisonment. Notwithstanding any other law to the contrary, the sentence of any person which is imposed for violating this Code section a second or subsequent time shall not be suspended by a court or a probationary sentence imposed in lieu thereof.

(d) The punishment prescribed for the violation of subsections (a) and (c) of this Code section shall not be probated or suspended as is provided by Code Section 17-10-7.

(e) Any crime committed in violation of this Code section shall be considered a separate offense. (Code 1981, § 16-11-160, enacted by Ga. L. 1996, p. 354, § 1; Ga. L. 2003, p. 256, § 1; Ga. L. 2008, p. 444, § 4/SB 400; Ga. L. 2014, p. 426, § 6/HB 770; Ga. L. 2015, p. 5, § 16/HB 90.)

The 2014 amendment, effective July 1, 2014, added subparagraph (a)(1)(D.1).

The 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, substituted "or firearm" for "or a firearm" near the middle of paragraph (a)(1).

Part 5
Brady Law Regulations

16-11-171. Definitions.

As used in this part, the term:

(1) "Center" means the Georgia Crime Information Center within the Georgia Bureau of Investigation.

(2) "Dealer" means any person licensed as a dealer pursuant to 18 U.S.C. Section 921, et seq.

(3) "Firearm" means any weapon that is designed to or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of any such weapon, any firearm muffler or firearm silencer, or any destructive device as defined in 18 U.S.C. Section 921(a)(3).

(4) "Involuntarily hospitalized" means hospitalized as an inpatient in any mental health facility pursuant to Code Section 37-3-81 or hospitalized as an inpatient in any mental health facility as a result of being adjudicated mentally incompetent to stand trial or being adjudicated not guilty by reason of insanity at the time of the crime pursuant to Part 2 of Article 6 of Title 17.

(5) "NICS" means the National Instant Criminal Background Check System created by the federal "Brady Handgun Violence Prevention Act" (P. L. No. 103-159). (Code 1981, § 16-11-171, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 2005, p. 613, § 1/SB 175; Ga. L. 2015, p. 5, § 16/HB 90; Ga. L. 2015, p. 805, § 8/HB 492.)

The 2015 amendments. — The first 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, deleted ", or Chapter 16 of Title 43." following "et seq." at the end of paragraph (2). The second 2015 amendment, effective July 1, 2015, made identical changes.

16-11-173. Legislative findings; preemption of local regulation and lawsuits; exceptions.

(a)(1) It is declared by the General Assembly that the regulation of firearms and other weapons is properly an issue of general, state-wide concern.

(2) The General Assembly further declares that the lawful design, marketing, manufacture, and sale of firearms and ammunition and other weapons to the public is not unreasonably dangerous activity and does not constitute a nuisance per se.

(b)(1) Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning, by ordinance or resolution, or by any other means, nor any agency, board, department, commission, political subdivision, school district, or authority of this state, other than the General Assembly, by rule or regulation or by any other means shall regulate in any manner:

(A) Gun shows;

(B) The possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or other weapons or components of firearms or other weapons;

(C) Firearms dealers or dealers of other weapons; or

(D) Dealers in components of firearms or other weapons.

(2) The authority to bring suit and right to recover against any weapons, firearms, or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of weapons, firearms, or ammunition to the public shall be reserved exclusively to the state. This paragraph shall not prohibit a political subdivision or local government authority from bringing an action against a weapons,

firearms, or ammunition manufacturer or dealer for breach of contract or express warranty as to weapons, firearms, or ammunition purchased by the political subdivision or local government authority.

(c)(1) A county or municipal corporation may regulate the transport, carrying, or possession of firearms by employees of the local unit of government, or by unpaid volunteers of such local unit of government, in the course of their employment or volunteer functions with such local unit of government; provided, however, that the sheriff or chief of police shall be solely responsible for regulating and determining the possession, carrying, and transportation of firearms and other weapons by employees under his or her respective supervision so long as such regulations comport with state and federal law.

(2) The commanding officer of any law enforcement agency shall regulate and determine the possession, carrying, and transportation of firearms and other weapons by employees under his or her supervision so long as such regulations comport with state and federal law.

(3) The district attorney, and the solicitor-general in counties where there is a state court, shall regulate and determine the possession, carrying, and transportation of firearms and other weapons by county employees under his or her supervision so long as such regulations comport with state and federal law.

(d) Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance or resolution, from requiring the ownership of guns by heads of households within the political subdivision.

(e) Nothing contained in this Code section shall prohibit municipalities or counties, by ordinance or resolution, from reasonably limiting or prohibiting the discharge of firearms within the boundaries of the municipal corporation or county.

(f) As used in this Code section, the term "weapon" means any device designed or intended to be used, or capable of being used, for offense or defense, including but not limited to firearms, bladed devices, clubs, electric stun devices, and defense sprays.

(g) Any person aggrieved as a result of a violation of this Code section may bring an action against the person who caused such aggrievement. The aggrieved person shall be entitled to reasonable attorney's fees and expenses of litigation and may recover or obtain against the person who caused such damages any of the following:

(1) Actual damages or $100.00, whichever is greater;

(2) Equitable relief, including, but not limited to, an injunction or restitution of money and property; and

(3) Any other relief which the court deems proper. (Code 1981, § 16-11-173, enacted by Ga. L. 1995, p. 139, § 2; Ga. L. 2005, p. 613, § 1/SB 175; Ga. L. 2011, p. 752, § 16/HB 142; Ga. L. 2014, p. 599, § 1-11/HB 60; Ga. L. 2015, p. 805, § 9/HB 492.)

The 2014 amendment, effective July 1, 2014, inserted "and other weapons" in paragraphs (a)(1) and (a)(2); substituted the present provisions of paragraph (b)(1) for the former provisions, which read: "No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms components."; in paragraph (b)(2), inserted "weapons," and inserted a comma following "firearms" throughout; designated the existing provisions of subsection (c) as paragraph (c)(1); added the proviso in paragraph (c)(1); added paragraphs (c)(2) and (c)(3); substituted "ordinance or resolution," for "ordinance, resolution, or other enactment," in subsections (d) and (e); and added subsections (f) and (g).

The 2015 amendment, effective July 1, 2015, in paragraph (b)(1), substituted "zoning, by" for "zoning or by", inserted ", or by any other means", inserted "political subdivision, school district,", and inserted "or by any other means"; in the middle of paragraph (c)(1), inserted ", or by unpaid volunteers of such local unit of government," and inserted "or volunteer functions"; and substituted "means any device designed or intended to be used, or capable of being used, for offense or defense, including but not limited to firearms, bladed devices, clubs, electric stun devices, and defense sprays" for "shall have the same meaning as set forth in Code Section 16-11-127.1" in subsection (f).

Editor's notes. — Ga. L. 2014, p. 599, § 1-1/HB 60, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Safe Carry Protection Act.'"

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 47 (2014).

JUDICIAL DECISIONS

Cited in Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012).

ARTICLE 5

OFFENSES INVOLVING ILLEGAL ALIENS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 35 (2011).

For comment, "Immigration Detention Reform: No Band Aid Desired," see 60 Emory L. J. 1211 (2011).

16-11-200. Definitions; offense of transporting or moving illegal aliens; exceptions; penalties.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Standing. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of

2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, an immigration attorney had standing to challenge section 7 because the attorney faced a credible threat of application of section 7. The attorney was a civil immigration attorney who alleged and declared that the attorney regularly transported undocumented immigrants to and from court hearings, met with immigrant clients in the attorney's law office, gave legal advice to undocumented immigrants who wished to remain in Georgia, and helped undocumented immigrants to enter Georgia for court business and hearings. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-200 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-201. Definitions; offense of concealing, harboring, or shielding an illegal alien; penalties; exceptions.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Preempted. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, the district court did not err in finding that section 7 was preempted by the criminal provisions of the Immigration and Nationality Act, particularly 8 U.S.C. § 1324. Section 7 created state criminal violations for: (1) transporting or moving an illegal alien, O.C.G.A. § 16-11-200(b); (2) concealing or harboring an illegal alien, O.C.G.A. § 16-11-201(b); and (3) inducing an illegal alien to enter the State of Georgia, O.C.G.A. § 16-11-202(b). Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-201 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

16-11-202. Illegal alien defined; offense of inducing an illegal alien to enter state; penalties.

Law reviews. — For article, "State Government: Illegal Immigration Reform and Enforcement Act of 2011," see 28 Ga. St. U.L. Rev. 51 (2011).

JUDICIAL DECISIONS

Preempted. — In a pre-enforcement constitutional challenge to sections 7 and 8 of Georgia House Bill 87, the Illegal Immigration Reform and Enforcement Act

of 2011, in which Georgia officials appealed a district court's entry of a preliminary injunction enjoining enforcement of those two sections, the district court did not err in finding that section 7 was preempted by the criminal provisions of the Immigration and Nationality Act, particularly 8 U.S.C. § 1324. Section 7 created state criminal violations for: (1) transporting or moving an illegal alien, O.C.G.A. § 16-11-200(b); (2) concealing or harboring an illegal alien, O.C.G.A. § 16-11-201(b); and (3) inducing an illegal alien to enter the State of Georgia, O.C.G.A. § 16-11-202(b). Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Offenses arising from a violation of O.C.G.A. § 16-11-202 are offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.